Supreme Court, U.S.
FILED

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No. ____

In the Supreme Court of the United States

SOUTH CAMDEN CITIZENS IN ACTION, ET AL.,
Petitioners,

v.

THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL.,
Respondents,

ST. LAWRENCE CEMENT CO., L.L.C.,
Intervenor-Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos: 01-2224 and 01-2296

[Filed January 15, 2002]

SOUTH CAMDEN CITIZENS IN ACTION,
GENEVA SANDERS, PAULINE WOODS,
BARBARA PFEIFFER, JULITA GILLIARD,
OSCAR LISBOA, SHIRLEY RIOS,
PHYLLIS HOLMES, GWEN PETERSON,
LATOYA COOPER, JULIO LUGO,

v.

THE NEW JERSEY DEPARTMENT
OF ENVIRONMENTAL PROTECTION,
ROBERT SHINN, JR.,
Commissioner of the New Jersey Department of
Environmental Protection, in his official capacity,

ST LAWRENCE CEMENT CO., L.L.C.,
Intervenor in D.C.,
Appellant.

BEFORE: BECKER, Chief Judge
SLOVITER, MANSMANN, SCIRICA, ALITO, ROTH,
McKEE, RENDELL, BARRY, AMBRO, FUENTES,
Circuit Judges, GREENBERG Senior Circuit Judge*

SUR PETITION FOR REHEARING

The petition for rehearing filed by Appellees in the above-entitled case, having been submitted to the judges who participated in the decision of this court, and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the petition for rehearing is hereby **DENIED**, Judges Mansmann, McKee and Fuentes would have granted rehearing.

IT IS SO ORDERED.

By the Court,

_____
Hon. Theodore A. McKee
Circuit Judge

Dated: Jan. 15, 2002

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* Judge Greenberg's vote is limited to panel rehearing only.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Case Nos. 01-2224 and 01-2296

[Filed December 17, 2001]

SOUTH CAMDEN CITIZENS IN ACTION, GENEVA SANDERS, PAULINE WOODS, BARBARA PFEIFFER, JULITA GILLIARD, OSCAR LISBOA, SHIRLEY RIOS, PHYLLIS HOLMES, GWEN PETERSON, LATOYA COOPER, and JULIO LUGO,	)	
v.	)	
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION; ROBERT C. SHINN, JR., Commissioner of the New Jersey Department of Environmental Protection, in his official capacity,	)	
ST. LAWRENCE CEMENT CO., L.L.C., Intervenor in D.C.,	)	Appellant in No. 01-2224

SOUTH CAMDEN CITIZENS IN ACTION, GENEVA SANDERS, PAULINE WOODS, BARBARA PFEIFFER, JULITA GILLIARD, OSCAR LISBOA, SHIRLEY RIOS, PHYLLIS HOLMES, GWEN PETERSON, LATOYA COOPER, and JULIO LUGO,	
v.	
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION; ROBERT C. SHINN, JR., Commissioner of the New Jersey Department of Environmental Protection, in his official capacity,	
ST. LAWRENCE CEMENT CO., L.L.C., Intervenor in D.C.,	
New Jersey Department of Environmental Protection; Robert C. Shinn, Jr.,	Appellants in No. 01-2296

Appeal from the United States District
Court for the District of New Jersey
(D.C. Civ. No. 01-00702)
District Judge: Honorable Stephen M. Orlofsky

JUDGES:

BEFORE: MCKEE, AMBRO, and GREENBERG,
Circuit Judges

OPINION

GREENBERG, Circuit Judge:

I. OVERVIEW

This matter comes on before this court on appeals by defendant-appellant New Jersey Department of Environmental Protection ("NJDEP") and intervenor-appellant St. Lawrence Cement Co., L.L.C. ("St. Lawrence") from the district court's order granting preliminary injunctive relief to plaintiffs, South Camden Citizens in Action and ten residents of the Waterfront South neighborhood of Camden, New Jersey. Plaintiffs brought this action pursuant to 42 U.S.C. §1983, as well as on other bases, claiming NJDEP discriminated against them by issuing an air permit to St. Lawrence to operate a facility that would have an adverse disparate racial impact upon them in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § § 2000d to 2000d-7.

Our opinion focuses on whether, following the Supreme Court's recent decision in *Alexander v. Sandoval,* 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001), plaintiffs can maintain this action under section 1983 for disparate impact discrimination in violation of Title VI and its implementing regulations. For the reasons we set forth, we hold that an administrative regulation cannot create an interest

enforceable under section 1983 unless the interest already is implicit in the statute authorizing the regulation, and that inasmuch as Title VI proscribes only intentional discrimination, the plaintiffs do not have a right enforceable through a 1983 action under the EPA's disparate impact discrimination regulations. Because the district court predicated its order granting injunctive relief on section 1983, we will reverse.

II. BACKGROUND AND PROCEDURAL HISTORY

A. Background

As we ultimately decide this appeal on a legal basis and the district court's opinions stated the facts at length, we only need summarize the factual background of this case. Initially, we point out that the residents of Waterfront South are predominately minorities and the neighborhood is disadvantaged environmentally.[1] Waterfront South contains two Superfund sites, several contaminated and abandoned industrial sites, and many currently operating facilities, including chemical companies, waste facilities, food processing companies, automotive shops, and a petroleum coke transfer station. Moreover, NJDEP has granted permits for operation of a regional sewage treatment plant, a trash-to-steam incinerator and a co-generation power plant in the neighborhood. As a result, Waterfront South, though only one of 23 Camden neighborhoods, hosts 20% of the city's

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[1] The Waterfront South community is comprised of 63 African-American, 28.3 Hispanic, and 9 white residents.

contaminated sites and, on average, has more than twice the number of facilities with permits to emit air pollution than exist in the area encompassed within a typical New Jersey zip code.

St. Lawrence supplies cement materials, primarily to the ready-mix concrete industry. One aspect of St. Lawrence's business is the processing of ground granulated blast furnace slag ("GBFS"), a sand-like by-product of the steel-making industry, used in portland cement. In 1998, St. Lawrence wanted to open a GBFS grinding facility on a site in Camden owned by the South Jersey Port Corporation (the "Port"). In furtherance of this project, in March 1999 St. Lawrence signed a lease with the Port for the site and initiated discussions with NJDEP with respect to obtaining construction and operation permits for the facility, primarily focusing on the air permit that required minimizing the emission of PM10, i.e., particulate matter with a diameter of 10 microns or less. NJDEP required St. Lawrence to conduct an air quality impact analysis for PM10 confirming that there would not be adverse health impacts from operation of the facility and that St. Lawrence's operations complied with the National Ambient Air Quality Standards for PM10. St. Lawrence completed the analysis, and NJDEP accepted the result that the facility's emissions would satisfy the established standards applicable to its operation.

On November 1, 1999, NJDEP notified St. Lawrence that the permit process was "administratively complete." Accordingly, NJDEP permitted St. Lawrence to begin construction of the facility, which it did in late 1999. Then, on July 25, 2000, NJDEP gave notice of a public hearing to be held on August 23, 2000, addressing St. Lawrence's draft

air permit. NJDEP stated, however, that it would accept written comments on the draft permit until August 31, 2000. Approximately 120 community members voiced their opinions and concerns about St. Lawrence's facility at the hearing, and several individuals provided NJDEP with written comments.

Thereafter, NJDEP issued a 33-page "Hearing Officer's Report Responses to Public Comments on the Draft Air Permit" for St. Lawrence. In the report, NJDEP addressed the concerns raised by community members, including environmental equity/environmental justice, preexisting local environmental issues, St. Lawrence's emission limits, the results of St. Lawrence's air quality impact analysis, truck emission standards and carbon monoxide air quality evaluation results, and the protection of the health and safety of Waterfront South residents. Plaintiffs, however, filed an administrative complaint with the EPA and a request for a grievance hearing with NJDEP, as they alleged that NJDEP's permit review procedures violated Title VI of the Civil Rights Act of 1964 because the procedures did not include an analysis of the allegedly racially disparate adverse impact of the facility. NJDEP did not respond to the grievance hearing request, and on October 31, 2000, issued St. Lawrence's final air permit.

B. Procedural History

On February 13, 2001, plaintiffs filed a complaint against NJDEP and NJDEP Commissioner Robert C. Shinn, Jr., alleging that they violated Title VI by intentionally discriminating against them in violation of section 601, 42 U.S.C. §2000d, by issuing the air quality permit and further asserting that the facility in operation under the air permit

would have an adverse disparate impact on them in violation of section 602, 42 U.S.C. §2000d-1. St. Lawrence subsequently intervened with the consent of the parties. Following the submission of briefs and expert reports and oral argument, the district court issued an opinion and order on April 19, 2001, granting plaintiffs' request for a preliminary injunction. *See South Camden Citizens in Action v. N.J. Dep't of Envtl. Prot.*, 145 F. Supp. 2d 446, 505 (D.N.J. 2001) ("*South Camden I*"). In reaching its conclusions, the court found that section 602 and its implementing regulations contained an implied private right of action. Therefore, inasmuch as the court found that plaintiffs otherwise were entitled to relief based on their disparate impact claim, it remanded the matter to NJDEP for a Title VI analysis. *See id.* at 473-84, 505.

South Camden I, however, had a short shelf life. On April 24, 2001, the Supreme Court issued its decision in *Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517, holding that "neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under §602. We therefore hold that no such right of action exists." *Id.* at ___, 121 S. Ct. at 1523 (footnote omitted). Obviously, *Sandoval* eliminated the basis for the court's injunction in *South Camden I*, an effect that led St. Lawrence to move to dissolve the injunction. The district court, however, denied the motion, following which St. Lawrence again sought similar relief or a stay of the injunction pending appeal. The district court then allowed plaintiffs to amend their complaint to add a claim to enforce section 602 through section 1983. The court also required supplemental briefing on plaintiffs' remaining claims, namely,

whether plaintiffs' intentional discrimination charge and/or their section 1983 claim could provide an alternate basis for relief. On May 10, 2001, the court issued a supplemental opinion and order continuing the preliminary injunction based on plaintiffs' section 1983 claim and again remanding the matter to NJDEP for a Title VI analysis. *See South Camden Citizens in Action v. N.J. Dep't of Envtl. Prot.*, 145 F. Supp. 2d 505 (D.N.J. 2001) (*South Camden II*). In reaching its result the court relied, inter alia, on *Powell v. Ridge*, 189 F.3d 387, 403 (3d Cir.), *cert. denied*, 528 U.S. 1046, 120 S. Ct. 579 (1999), in which we held that there was a private right of action available to enforce a regulation implementing Title VI and that a disparate impact discrimination claim could be maintained under section 1983 for a violation of a regulation promulgated pursuant to section 602. *See South Camden II*, 145 F. Supp. 2d at 520, 525, 543. Immediately thereafter, St. Lawrence unsuccessfully moved in the district court for a stay of the preliminary injunction pending appeal.

St. Lawrence appealed to this court, and on May 15, 2001, filed with us a motion to suspend or, in the alternative, to modify the preliminary injunction pending appeal, as well as a request for expedited review of the appeal. On May 29, 2001, NJDEP requested a stay of the remand process from the district court, but on June 4, 2001, the district court denied that request. NJDEP then made the same application to this court on June 6, 2001, but we denied its motion on June 11, 2001. On June 12, 2001, however, we granted St. Lawrence's request for expedited review, and on June 15, 2001, we granted St. Lawrence's request to suspend the preliminary injunction pending appeal.

III. DISCUSSION

As we have indicated, plaintiffs in their amended complaint sought an injunction under section 1983 preventing operation of St. Lawrence's GBFS grinding facility.[2] The district court found that plaintiffs stated a claim under section 1983 against NJDEP for violating section 602 and its implementing regulations by failing to consider the potentially adverse discriminatory impact of permitting operation of the facility, and therefore enjoined its operation until NJDEP made such a determination.[3] We review the district court's order granting a preliminary injunction for abuse of discretion, although we review factual findings for clear error and questions of law de novo. *See AT&T v. Winback and Conserve Program, Inc.*, 42 F.3d 1421, 1426-27 (3d Cir. 1994).

We often have recognized that injunctive relief, particularly preliminary relief, is an "extraordinary remedy... which should be granted only in limited circumstances." *Id.* (citation omitted). To obtain a preliminary injunction, the moving party must demonstrate: (1) the reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured if relief is not granted. Moreover, the

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[2] The district court had jurisdiction over this matter pursuant to 28 U.S.C. §§1331, 1343, and we have jurisdiction pursuant to 28 U.S.C. §1292(a)(1).

[3] The parties agree that the NJDEP receives grants of federal financial assistance so as to be subject to Title VI of the Civil Rights Act of 1964, including sections 601 and 602.

district court also should take into account, when relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest. *See In re Arthur Treacher's Franchisee Litig.*, 689 F.2d 1137, 1143 (3d Cir. 1982). Thus, "a failure to show a likelihood of success or a failure to demonstrate irreparable injury must necessarily result in the denial of a preliminary injunction." *Id.* at 1143.

We first consider the probability of plaintiffs' success in the litigation and, indeed, as we find that their case is legally insufficient, we will go no further. Naturally, in view of *Sandoval*, the overarching legal issue on this appeal is whether plaintiffs can advance a cause of action to enforce section 602 of Title VI and its implementing regulations through section 1983. If they cannot, then the only basis on which they can obtain relief is to demonstrate that the NJDEP engaged in intentional discrimination, a possibility that we do not address on this appeal.

We start our legal analysis with a consideration of *Sandoval* in which the Court held that a private right of action is not available to enforce disparate impact regulations promulgated under Title VI,[4] thus overruling *Powell* at least

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[4] We have set forth conditions that can lead to the recognition of a private right of action not explicitly created as follows:

> When a statute does not explicitly supply a private right of action, two occasionally intersecting avenues may be explored for a possible private right of enforcement. First, an implied private right of action to enforce the statute may exist

directly under the statute in accordance with the four-factor analysis of *Cort v. Ash*, 422 U.S. 66, 78, 95 S. Ct. 2080, 2088, 45 L. Ed. 2d 26 (1975). To establish an implied private right of action under *Cort v. Ash*, the plaintiff must satisfy the first requirement--that the statute creates a federal right in favor of the plaintiff. The plaintiff must then satisfy the three remaining *Cort v. Ash* requirements relating to the existence of a remedy--that Congress intended to create a remedy, that the remedy is consistent with the legislative scheme, and that the cause of action is not traditionally relegated to state law. In sum, under *Cort v. Ash* the plaintiff bears the burden of establishing not only the existence of a right, but also the existence of an intended private remedy.

In appropriate cases, the second avenue for private enforcement of a federal statute is §1983. In determining whether a private right of action exists under §1983, only two inquiries are relevant: one, whether the statute alleged to have been violated creates a federal right in favor of the plaintiff, and the other, whether Congress has foreclosed the remedy of private enforcement. The §1983 analysis intersects with the *Cort v. Ash* analysis insofar as the plaintiff under both analyses must establish the creation of a federal right. With respect to the existence of a remedy, however, the contrast between the two analyses is stark. Under *Cort v. Ash* the plaintiff must establish that Congress intended the remedy. Under §1983 analysis, on the other hand, once a federal right is established, the existence of a remedy is presumed because §1983

to the extent that it held to the contrary. *See Sandoval*, 532 U.S. at ___, 121 S. Ct. at 1523. In *Sandoval*, the Court considered a challenge to the Alabama Department of Public Safety's official policy of administering its driver's license examination only in English as violative of Title VI and its implementing regulations. *See id.* at ___, 121 S. Ct. at 1515. The Court held that "neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under §602. We therefore hold that no such right of action exists." *Id.* at ___, 121 S. Ct. at 1523. *In reaching its result in *Sandoval*, the Court began by listing three aspects of Title VI that "must be taken as given": (1) private individuals may sue to enforce section 601 of Title VI and obtain both injunctive relief and damages; (2) section 601 prohibits only intentional discrimination; and (3) for the purposes of the case, regulations promulgated pursuant to section 602 validly may proscribe disparate impact discrimination even though it is permissible under section 601. *See id.* at ___, 121 S. Ct. at 1516-17. Then, the Court considered whether section 602 regulations conferred a private right of action, looking to its precedent interpreting

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> itself provides the authorization for private enforcement. The burden is on the defendant to establish that Congress intended to foreclose private enforcement.

W. Va. Univ. Hosp. v. Casey, 885 F.2d 11, 18 n.1 (3d Cir. 1989). In *Sandoval*, the Court focused exclusively on whether Congress had created a federal right in favor of the plaintiff, the same essential question at issue here.

Title VI and to the text and structure of Title VI. *See id.* at ___, 121 S. Ct. at 1519. First, the Court noted, based on its analysis of its holdings in its prior Title VI cases, that it previously had not held that there is such a private right of action under section 602. *See id.* at ___, 121 S. Ct. at 1517-21 (citing *Lau v. Nichols*, 414 U.S. 563, 94 S. Ct. 786, 39 L. Ed. 2d 1 (1974) (holding that section 601 prohibits disparate impact discrimination); *Cannon v. Univ. of Chicago,* 441 U.S. 677, 694, 99, 60 L. Ed. 2d 560, 99 S. Ct. 1946 S. Ct.1946, 1956 (1979) (holding that private right of action exists to enforce Title IX, which is patterned after Title VI); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287, 98 S. Ct. 2733, 2746, 57 L. Ed. 2d 750 (1978) (holding, contrary to Lau, that section 601 proscribes only those classifications that would violate the Equal Protection Clause of the Fifth Amendment, namely intentional discrimination); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (1983) (affirming *Bakke's* holding that section 601 prohibits only intentional discrimination); *Alexander v. Choate*, 469 U.S. 287, 293, 105 S. Ct. 712, 716, 83 L. Ed. 2d 661 (1985) (same)).

The Court then found that section 602's text and structure did not evince an intent to create a private right of action and that the regulations alone were insufficient to create a private right of action. *See id.* at ___, 121 S. Ct. at 1520-22 ("Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not."). Therefore, the Court held that a private right of action was not available to enforce regulations promulgated under section 602. *See id.* at ___, 121 S. Ct. at 1523. However, inasmuch as the plaintiffs in *Sandoval* did not advance a cause of action

under section 1983 to enforce Title VI and its implementing regulations, the majority did not consider whether such an action is available.[5]

Resolution of this issue, therefore, requires us to examine whether disparate impact regulations promulgated pursuant to section 602 may, and if so do, create a right that may be enforced through a section 1983 action.

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[5] In his dissent, Justice Stevens stated the following with regard to section 1983:

> To the extent that the majority denies relief to the respondents merely because they neglected to mention 42 U.S.C. §1983 in framing their Title VI claim, this case is something of a sport. Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference §1983 to obtain relief; indeed, the plaintiffs in this case (or other similarly situated individuals) presumably retain the option of re-challenging Alabama's English-only policy in a complaint that invokes §1983 even after today's decision.

Sandoval, 532 U.S. at ___, 121 S. Ct. at 1527 (Stevens, J., dissenting). The majority does not address the dissent's statement. Nevertheless, for the reasons that follow, we conclude that the majority's opinion and Supreme Court precedent do not permit the bringing of the section 1983 action that Justice Stevens suggested is available.

Section 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

Therefore, section 1983 provides a remedy for deprivation under color of state law of "any rights . . . secured by the Constitution and laws." In *Maine v. Thiboutot*, 448 U.S. 1, 6-8, 100 S. Ct. 2504, 2505-06, 65 L. Ed. 2d 555 (1980), the Supreme Court interpreted this language and held that causes of action under section 1983 are not limited to claims based on constitutional or equal rights violations. Rather, certain rights created under federal statutes are enforceable through section 1983 as well. This rule, however, is limited by two well-recognized exceptions. First, a section 1983 remedy is not available "where Congress has foreclosed such enforcement of the statute in the enactment itself." *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 423, 107 S. Ct. 766, 770, 93 L. Ed. 2d 781 (1987). Second, the remedy is not available "where the statute did not create enforceable rights, privileges, or immunities within the meaning of §1983." *Id.*

The Supreme Court has established a three-part test to determine whether a federal statute creates an individual right enforceable through a section 1983 action:

First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

Blessing v. Freestone, 520 U.S. 329, 340-41, 117, 137 L. Ed. 2d 569, 117 S. Ct. 1353, 1359-60 (1997). If a plaintiff satisfies each of these elements, and therefore establishes and identifies a federal right that allegedly has been violated, a rebuttable presumption that the right is enforceable through section 1983 arises. *See id.* at 341, 117 S. Ct. at 1360; *see also Banks v. Dallas Housing Auth.*, 271 F.3d 605, 2001 U.S. App. LEXIS 22752, 2001 WL 1285391, at *4 (5th Cir. Oct. 24, 2001). We have found two circumstances, which in harmony with Wright, are sufficient to rebut this presumption: where "Congress specifically foreclosed a remedy under §1983, [either] expressly, by forbidding recourse to §1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under §1983." *Powell*, 189 F.3d at 401 (citations omitted). In the former case, the plaintiff's claim must fail. In the latter case, however, the burden shifts to the defendant to "make the difficult showing that allowing a §1983 action to go forward in these circumstances 'would be inconsistent with Congress' carefully tailored scheme.' " *Id.* (quoting *Blessing*, 520 U.S. at 346, 117 S. Ct. at 1362).

Here, plaintiffs seek to enforce a prohibition on disparate impact discrimination that does not appear explicitly in Title VI, but rather is set forth in EPA regulations. They contend that the regulations are a valid interpretation of Title VI.[6] Section 601 of Title VI provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. §2000d. Section 602 provides, in relevant part:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d [Section 601] of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives

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[6] We assume without deciding that the regulations are valid, as neither NJDEP nor St. Lawrence timely challenged them in the district court and our analysis does not turn on their validity. That being said, like the Court stated in *Sandoval*, we observe that there does seem to be considerable tension between the section 602 regulations proscribing activities that have a disparate impact and section 601's limitation to interdiction only of intentionally discriminatory activities. *See Sandoval*, 532 U.S. at ___, 121 S. Ct. at 1517.

of the statute authorizing financial assistance in connection with which the action is taken.

Id. §2000d-1. Finally, the EPA regulations at issue provide:

> No person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, [or] national origin . . . .
>
> A recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex.

40 C.F.R. §§7.30 & 7.35(b). According to plaintiffs, these statutory provisions and their complementary regulations prohibiting discriminatory impacts in administering programs create a federal right enforceable through section 1983.

This contention raises the question of whether a regulation can create a right enforceable through section 1983 where the alleged right does not appear explicitly in the statute, but only appears in the regulation. The district court found that the Supreme Court, as well as this court, have found that a regulation may create an enforceable right, *see South Camden II*, 145 F. Supp. 2d at 526-27 (citing *Wright*, 479 U.S. at 418, 107 S. Ct. at 766; *W. Va. Univ. Hosp. v. Casey*, 885 F.2d 11, 18 (3d Cir. 1989); *Alexander v. Polk*,

750 F.2d 250 (3d Cir. 1984)), and therefore concluded that the three-prong Blessing test applied to determine whether the EPA regulations indeed created a federal right. *See id.* at 529. For the reasons that follow, however, we are satisfied that the district court's conclusion was erroneous. Thus, as the plaintiffs do not advance any federal right to enforce, the district court erred in granting relief on the basis of section 1983.

In considering whether a regulation in itself can establish a right enforceable under section 1983, we initially point out that a majority of the Supreme Court never has stated expressly that a valid regulation can create such a right. In Guardians Ass'n Justice Stevens, joined by Justices Brennan and Blackmun, wrote: "It is clear that the §1983 remedy is intended to redress the deprivation of rights secured by all valid federal laws, including statutes and regulations having the force of law." *See Guardians Ass'n*, 463 U.S. at 638, 103 S. Ct. at 3251. According to them, the rationale of Thiboutot applied equally to statutes and administrative regulations having the force of law. *See id.* at 638 n.6, 103 S. Ct. at 3251 n.6. But later in Wright, four Justices expressed the contrary view. *See Wright*, 479 U.S. at 437-38, 107 S. Ct. at 777-78 (O'Conner, J., dissenting). Justice O'Conner, joined by Chief Justice Rehnquist, Justice Powell, and Justice Scalia, wrote in dissent:

> In the absence of any indication in the language, legislative history, or administrative interpretation of the Brooke Amendment that Congress intended to create an enforceable right to utilities, it is necessary to ask whether administrative regulations alone could create

> such a right. This is a troubling issue not briefed by the parties, and I do not attempt to resolve it here. The Court's questionable reasoning that, because for four years HUD gave somewhat less discretion to the PHA's in setting reasonable utilities allowances, HUD understood Congress to have required enforceable utility standards, apparently allows it to sidestep the question. I am concerned, however, that lurking behind the Court's analysis may be the view that, once it has been found that a statute creates some enforceable right, any regulation adopted within the purview of the statute creates rights enforceable in federal courts, regardless of whether Congress or the promulgating agency ever contemplated such a result. Thus, HUD's frequently changing views on how best to administer the provision of utilities to public housing tenants becomes the focal point for the creation and extinguishment of federal 'rights.' Such a result, where determination of §1983 'rights' has been unleashed from any connection to congressional intent, is troubling indeed.

Id.

Notwithstanding the foregoing cautionary language, the district court relied on Wright in holding that federal regulations may create rights enforceable through section 1983. In Wright, the plaintiffs alleged the housing authority violated a federal statute imposing a rent ceiling and the

statute's implementing regulations which required public housing authorities to include a reasonable utility allowance in tenants' rent. *See id.* at 419, 107 S. Ct. at 768. The defendants argued that neither the statute nor the regulations gave the tenants a right enforceable through section 1983. *See id.* at 429-30, 107 S. Ct. at 773. In response, the Court stated:

> We perceive little substance in this claim. The Brooke Amendment could not be clearer: as further amended in 1981, tenants could be charged as rent no more and no less than 30 percent of their income. This was a mandatory limitation focusing on the individual family and its income. The intent to benefit tenants is undeniable. Nor is there any question that HUD interim regulations, in effect when this suit began, expressly required that a 'reasonable' amount for utilities be included in rent that a PHA was allowed to charge, an interpretation to which HUD has adhered both before and after the adoption of the Brooke Amendment. HUD's view is entitled to deference as a valid interpretation of the statute, and Congress in the course of amending that provision, has not disagreed with it.

Respondent nevertheless asserts that the provision for a 'reasonable' allowance for utilities is too vague and amorphous to confer on tenants an enforceable 'right' within the meaning of §1983 and that the whole matter of utility allowances must be left to the discretion of the PHA, subject

to supervision by HUD. The regulations, however, defining the statutory concept of 'rent' as including utilities, have the force of law . . ., they specifically set out guidelines that the PHAs were to follow in establishing utility allowances, and they require notice to tenants and an opportunity to comment on proposed allowances. In our view, the benefits Congress intended to confer on tenants are sufficiently specific and definite to qualify as enforceable rights under *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981) and §1983, rights that are not, as respondent suggests, beyond the competence of the judiciary to enforce.

Id. at 430-32, 107 S. Ct. at 773-75 (footnotes omitted).[7]

As we have indicated, the district court held, and the appellees argue here, that Wright stands for the proposition that valid federal regulations may create rights enforceable under section 1983, to which the Blessing analysis applies. Therefore, the appellees argue that because the EPA's section 602 regulations are valid and enforceable, we should apply the Blessing analysis and conclude that the regulations create rights enforceable through section 1983.

The district court's holding was, however, erroneous because, as the foregoing quotation from the Court's opinion

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[7] The Court of Appeals for the Fifth Circuit recently in *Banks v. Dallas Housing Authority*, 271 F.3d 605, 2001 WL 1285391, at *4, indicated that a statutory obligation in 42 U.S.C. §1437f(e) (repealed) to provide "decent, safe, and sanitary" housing was too vague to be judicially enforceable under section 1983, distinguishing Wright.

makes clear, Wright dealt with an issue that differs from that presented in the district court and here. There, the Court, in finding the statute and its implementing regulations created a right enforceable through section 1983, focused on tying the right to a reasonable utility allowance to Congress' intent to create federal rights through the statute. The Court looked first to the statutory provision creating the ceiling on tenants' rent, describing it as "a mandatory limitation focusing on the individual family and its income." *Id.* at 430, 107 S. Ct. at 773-74. Further, it stated that Congress' intent with regard to the statute to benefit tenants was "undeniable." *Id.* at 430, 107 S. Ct. at 774. Having reached this conclusion, it turned to the regulations and found that they were entitled to deference as valid administrative interpretations of the statute. *Id.*, 107 S. Ct. at 774. It afforded this deference, however, after having found that Congress had conferred upon plaintiffs that right by statute. *Id.*, 107 S. Ct. at 773.

Clearly, therefore, the regulation at issue in Wright merely defined the specific right that Congress already had conferred through the statute. *See id.* at 430 n.11 & 431, 107 S. Ct. at 774 & n.11 (rejecting "respondent's argument that the Brooke Amendment's rent ceiling applies only to the charge for shelter and that the HUD definition of rent as including a reasonable charge for utilities is not authorized by the statute" and stating regulations "defined the statutory concept of 'rent' "). There should be no doubt on this point, for the Court plainly stated that "the benefits Congress intended to confer on tenants are sufficiently specific and definite to qualify as enforceable rights under Pennhurst and §1983, rights that are not, as respondent suggests, beyond the competence of the judiciary to enforce." *Id.* at 432, 107 S. Ct. at 774-75 (emphasis added). Therefore, the Wright Court

located the alleged right in the statutory provision and then relied upon the implementing regulations to define and interpret that right. Critically, as pertains to this case, Wright does not hold that a regulation alone--i.e., where the alleged right does not appear explicitly in the statute, but only appears in the regulation --may create an enforceable federal right. It is thus manifest that, inasmuch as the disparate impact regulations go far beyond the intentional discrimination interdiction in section 601, the district court's reliance on Wright was misplaced.

Similarly, although also relied upon by the district court, none of our opinions in *Alexander*, *Casey*, or *Powell* nor that of the Court of Appeals for the Ninth Circuit in *Buckley v. City of Redding*, 66 F.3d 188 (9th Cir. 1995), justifies the district court's conclusion that valid regulations may create rights enforceable under section 1983. In Alexander, we held that federal regulations governing the administration of the Supplemental Food Program for Women, Infants and Children created rights enforceable under section 1983 for recipients of program assistance. *See Alexander*, 750 F.2d at 261. But the right enforceable through section 1983, namely notice of the right to a fair hearing upon termination of benefits, could be traced to and was consistent with the statute as it provided for cash grants to local agencies to enable them to carry out health and nutrition programs to make supplemental food available to pregnant and lactating women and infants. Accordingly, the statute created a right to supplemental food for those who qualified. *See id.* at 253 & n.3.

We recognize that in Alexander we never expressly identified the right as stemming from the statute. Nevertheless

we did not expressly analyze the question of whether a federal regulation could create an enforceable section 1983 right. Instead, after stating the general rule that violations of federal statutes may be actionable under section 1983 except where Congress has foreclosed section 1983 enforcement or the statute does not create enforceable rights, we simply concluded that the regulation created an enforceable right. *See id. at 259.*

But Alexander did not involve a circumstance in which the regulations attempted to create a federal right beyond any that Congress intended to create in enacting the statute. Furthermore, we decided Alexander in 1984, well before the Supreme Court refined its analysis to focus directly on Congress' intent to create enforceable rights and to confine its holdings to the limits of that intent. *See Blessing*, 520 U.S. at 341, 117 S. Ct. at 1360-61 (concentrating on Congress' intent to create rights in statute enforceable through section 1983); *Suter v. Artist M.*, 503 U.S. 347, 357, 112 S. Ct. 1360, 1367, 118 L. Ed. 2d 1 (1992) (same); *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 510, 110, 110 L. Ed. 2d 455, 110 S. Ct. 2510 S. Ct. 2510, 2517-18 (1990) (same); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 110-11, 110 S. Ct. 444, 451, 107 L. Ed. 2d 420 (1989) (same); *Wright*, 479 U.S. at 430, 107 S. Ct. at 774 (focusing on Congress' intent to create rights in statute enforceable through section 1983, and finding implementing regulation defined right). Therefore, Alexander is distinguishable from this case.

So, too, is Casey. There, we stated, citing only Wright and Alexander, that "valid federal regulations as well as federal statutes may create rights enforceable under section 1983." *Casey*, 885 F.2d at 18. The issue in Casey, however,

was only whether the federal Medicaid statute, not its implementing regulations, created a federal right enforceable through section 1983. *See id.* at 17 ("The threshold issue in this case is whether [the plaintiff] can assert a cause of action against the defendant state officials under 42 U.S.C. §1983 for alleged violation of the federal medicaid statute."). Therefore, our broader statement was dicta not binding here.

Plaintiffs place much reliance on *Powell v. Ridge*, 189 F.3d at 403, in which we indicated that a disparate impact discrimination claim could be maintained under section 1983 for a violation of a regulation promulgated pursuant to section 602. There, the plaintiffs brought a Title VI action against the Commonwealth of Pennsylvania, challenging its practices in funding public education on the ground that they had a racially discriminatory effect. *See id.* at 391. On appeal, we considered, among other things, whether there was a private right of action available to enforce a regulation implementing Title VI, as well as whether a plaintiff can maintain a claim under section 1983 for a violation of that regulation. *See id.* We answered both questions in the affirmative, stating that section 602 and the Department of Education regulation at issue provided a private right of action, and that plaintiffs also could utilize section 1983 to redress defendants' alleged violation of the statute and regulation. *See id.* at 399-400, 403.

Powell, however, should not be overread. Initially, it held that section 602 and the regulations under it included a private right of action. Moreover, in then authorizing the section 1983 action we merely rejected three specific arguments: (1) that the individual defendants were not

"persons" amenable to suit under section 1983;[8] (2) that Title VI possessed a comprehensive enforcement scheme that precluded the assertion of the section 1983 claim; and (3) that our precedents barring certain claims under Title IX of the Education Amendments of 1972 should have barred the action in *Powell* as well. *See Powell*, 189 F.3d at 400-03. But *Powell* did not analyze the foundation issue that is central here, i.e., whether a regulation in itself can create a right enforceable under section 1983. In *Powell*, we seemed simply to assume for section 1983 purposes that it could. *See id.* at 401 ("Once a plaintiff has identified a federal right that has allegedly been violated, there arises a 'rebuttable presumption that the right is enforceable under §1983.' "). Thus, while plaintiffs rely heavily on *Powell*, that reliance is misplaced, and, accordingly, quite aside from the impact of *Sandoval*, *Powell* could not control the outcome here.[9]

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[8] On appeal, the defendants did not advance this argument even though the district court had relied on it. *See Powell*,189 F.3d at 401.

[9] It cannot be argued plausibly that by holding in *Powell* that there was a private right of action under Title VI, we necessarily determined that the plaintiffs in *Powell* had a right enforceable under section 1983. Even if it could be so argued, however, the aspect of the opinion holding that there is a private right of action under Title VI did not survive *Sandoval* and thus the 1983 claim would not survive either. In any event, the district court in South Camden II did not determine that the plaintiffs had a right enforceable under section 1983 merely because in *Powell* we had determined that there was a private right of action enforceable under Title VI. Rather, the court in South Camden II made an independent examination of whether a section 1983 action was available, just as we do. Indeed, it hardly could have avoided

Similarly, the district court's reliance on Buckley was misplaced. The issue there was whether the Federal Aid in Sport Fish Restoration Act and its interpretive regulations created an enforceable federal statutory right under section 1983. *See Buckley*, 66 F.3d at 189-90. The court, after analyzing the relevant statutory and regulatory language, held that it did. *See id.* at 193. Inasmuch as the court stated expressly that it was determining whether the federal statute and its implementing regulations conferred a section 1983 right and not whether such a right arose under the implementing regulations alone, Buckley is distinguishable. *See also Powell*, 189 F.3d at 401; *Farley v. Philadelphia Hous. Auth.*, 102 F.3d 697, 699 (3d Cir. 1996) ("[The] cause of action arises strictly under[the statutory provision.] Regulation §966.57(b) merely interprets that section."); *Doe v. District of Columbia*, 320 U.S. App. D.C. 198, 93 F.3d 861, 867 (D.C. Cir. 1996) (analyzing both statute and its accompanying regulations in determining whether enforceable section 1983 right existed); *Tony L. v. Childers*, 71 F.3d 1182, 1189 (6th Cir. 1995) (same); *City of Chicago v. Lindley*, 66 F.3d 819, 827 (7th Cir.1995) (same); *Martinez v. Wilson*, 32 F.3d 1415, 1421 & n.4 (9th Cir. 1994) (same); *Howe v. Ellenbecker*, 8 F.3d 1258, 1263 (8th Cir. 1993) (same), overruled by *Blessing*, 520 U.S. at 348, 117 S. Ct. at 1363; *Albiston v. Me. Comm'r of Human Servs.*, 7 F.3d 258, 265 (1st Cir. 1993) (same), overruled by *Blessing*, 520 U.S. at 348, 117 S. Ct. at 1363; *Pinnacle Nursing Home v.*

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making that analysis as it cited favorably *Santiago v. Hernandez*, 53 F. Supp. 2d 264, 268 (E.D.N.Y. 1999), for the point that "it is conceptually possible for plaintiff who is the intended beneficiary of a statute to have a §1983 action but not a private right of action, or vice versa . . . ."

Axelrod, 928 F.2d 1306, 1313-14 (2d Cir. 1991) (same); *Samuels v. District of Columbia*, 248 U.S. App. D.C. 128, 770 F.2d 184, 195 (D.C. Cir. 1985) (same).

There are cases in other circuits addressing the question of whether a regulation alone may create a right enforceable under section 1983. The Courts of Appeals for the Fourth and Eleventh Circuits concluded that they may not and the Court of Appeals for the Sixth Circuit decided to the contrary. In *Smith v. Kirk*, 821 F.2d 980, 982 (4th Cir. 1987), the court considered whether the state's use of an economic needs test on disabled persons requesting vocational rehabilitation services stated a cause of action under section 1983 for violations of the Social Security Act and its implementing regulations. After concluding that nothing in the statute created an entitlement to vocational rehabilitation services, the court addressed the plaintiff 's argument that the mandatory language utilized in the implementing regulations created such a right. *See id.* at 984. The court rejected this claim, stating:

> An administrative regulation . . . cannot create an enforceable §1983 interest not already implicit in the enforcing statute. The Supreme Court has never held that one could--to the contrary, members of the Court have expressed doubt that 'administrative regulations alone could create such a right.'

Id. (quoting *Wright*, 479 U.S. at 437, 107 S. Ct. at 777 (O'Conner, J., dissenting)). Therefore, the court affirmed the district court's dismissal of the plaintiff 's section 1983 cause of action. *See id.; see also Former Special Project Employees*

Ass'n v. City of Norfolk, 909 F.2d 89, 94 (4th Cir. 1990) (following Smith and concluding that "because [the statutory provision] does not provide an enforceable right, the [administrative regulation is] irrelevant to our consideration of the employee's claim under section 1983").

The Court of Appeals for the Eleventh Circuit reached a similar conclusion in *Harris v. James*, 127 F.3d 993 (11th Cir. 1997). There, the court considered whether a Medicaid regulation requiring states to provide non-emergency transportation to and from providers created a right to such transportation enforceable under section 1983. *See id.* at 996. The court began by reviewing the Supreme Court's precedent governing whether violations of federal statutes create section 1983 causes of action. *See id.* at 997-1005. Then, the court turned to the specific question of whether the regulation created a federal right. *See id.* at 1005. There, like here, the requirement plaintiffs sought to enforce "appeared explicitly not in the Medicaid Act, but in a federal regulation," with the plaintiffs claiming that "the regulatory and statutory provisions created a federal right to transportation to and from providers." *Id.* The court rejected this argument. *See id.* at 1009-10.

In doing so, it first acknowledged the relative dearth of authority on this precise issue, noting that courts of appeals are split and that the Supreme Court never definitively addressed the matter. *See id.* at 1005-07 (citing *Wright*, 479 U.S. at 437-38, 107 S. Ct. at 777-78 (O'Conner, J., dissenting); *Guardians Ass'n*, 463 U.S. at 638, 103 S. Ct. at 3251; *Loschiavo v. City of Dearborn*, 33 F.3d 548, 551 (6th Cir. 1994); *Smith*, 821 F.2d at 984). The court then analyzed the majority opinion in Wright to ascertain whether it rejected

the dissent's view of cases involving federal regulations, namely that administrative regulations alone cannot create enforceable federal rights, and found that it did not. *See Harris v. James*, 127 F.3d at 1007-08 ("We conclude that the Wright majority did not hold that federal rights are created either by regulations 'alone' or by any valid administrative interpretation of a statute creating some enforceable right."). Therefore, the court rejected the argument that a " 'federal right' [may be found] in any regulation that in its own right meets the three-prong 'federal rights' test," as well as the argument that "enforceable rights [may be found] in any valid administrative interpretation of a statute that creates some enforceable right." *Id.* at 1008. Instead, it adopted the rule that:

> So long as the statute itself confers a specific right upon the plaintiff, and a valid regulation merely further defines or fleshes out the content of that right, then the statute--'in conjunction with the regulation'--may create a federal right as further defined by the regulation.
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> . . .
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> [But], if the regulation defines the content of a statutory provision that creates no federal right under the three-prong test, or if the regulation goes beyond explicating the specific content of the statutory provision and imposes distinct obligations in order to further the broad objectives underlying the statutory provision, we think the regulation is too far removed

> from Congressional intent to constitute a 'federal right' enforceable under §1983. To hold otherwise would be inconsistent with the driving force of the Supreme Court precedent requiring a Congressional intent to create federal rights and with the Supreme Court's directive that courts must find that Congress has unambiguously conferred federal rights on the plaintiff.

Id. at 1009 (footnotes omitted).

Applying this rule, the court concluded that the regulation did not define the content of any specific right conferred upon the plaintiffs by statute because the "nexus between the regulation and Congressional intent to create federal rights [was] simply too tenuous to create an enforceable right to transportation." *Id.* at 1009-10. Finally, the court stated:

> It may be that each of these statutes creates some federal right; similarly, it may be that the transportation regulation is a valid interpretation of each of these provisions under Chevron. However, we do not think these two factors, even if we found both to be true, would add up to a federal right of transportation. In each case the transportation regulation would be valid not because it reasonably defines the content of rights created by the statutory provisions, as did the regulation in Wright, but only because the regulation furthers the broad objectives

> underlying each statutory provision. . . . Instead, if the regulation is a valid interpretation of these provisions, it would be because transportation may be a reasonable means of ensuring the prompt provision of assistance, comparable assistance, or choice among providers. Such links to Congressional intent may be sufficient to support the validity of a regulation; however, we think they are too tenuous to support a conclusion that Congress has unambiguously conferred upon Medicaid recipients a federal right to transportation enforceable under §1983.

Id. at 1011-12 (footnote omitted); *see Kissimmee River Valley Sportsman Ass'n v. City of Lakeland*, 250 F.3d 1324, 1327 (11th Cir. 2001) (applying Harris and concluding that "even more clearly . . . the instant regulation imposes new and 'distinct obligations' not found in the statute itself, and thus is 'too far removed from the Congressional intent to constitute a federal right enforceable under §1983' "), *cert. denied*, 2001 U.S. LEXIS 10627 (Nov. 26, 2001) (No. 01-204); *Doe v. Chiles*, 136 F.3d 709, 717 (11th Cir. 1998) (utilizing Harris analysis and finding federal right was created by statute and regulations that "further defined the contours of the statutory right" at issue).

The Court of Appeals for the Sixth Circuit, however, reached the opposite result in Loschiavo. There, the court held that because administrative regulations have the force of law, they may create enforceable rights under section 1983. *See Loschiavo*, 33 F.3d at 551 (citing *Wright*, 479 U.S. at 431, 107 S. Ct. at 774). Accordingly, the court concluded

that the regulation at issue created a federal right enforceable through section 1983. *See id.* at 552-53; *see also Levin v. Childers*, 101 F.3d 44, 47 (6th Cir. 1996) (stating Loschiavo court held "plaintiffs may use Section 1983 to enforce not only constitutional rights, but also those rights defined by federal statutes [and federal regulations]").[10]

Nevertheless, in light of the foregoing analysis, we reject the Loschiavo approach. To start with, we reiterate that in *Sandoval* the Court made the critical point that "language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not." 532 U.S. at ___, 121 S. Ct. at 1522. Furthermore, as we noted previously, the Court's focus in Wright was on tying Congress' intent to create federal rights through the statute to the particular federal right claimed. *See Wright*, 479 U.S. at 430, 107 S. Ct. at 774; *Harris*, 127 F.3d at 1008-09. It was of paramount importance that Congress intended to create such a right in the statute, with the regulation then defining the right that Congress already conferred through the statute. *See Wright*, 479 U.S. at 430 n.11 & 431, 107 S. Ct. at 774 & n.11; *Harris*, 127 F.3d at 1008.

Moreover, it is apparent that in the Court's section 1983 jurisprudence after Wright dealing with whether a plaintiff is advancing an enforceable right, the primary

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[10] Of course, when the issue was raised in a district court within the Sixth Circuit the court followed Loschiavo. *See Lucero v. Detroit Public Sch.*, 160 F. Supp. 2d 767, 781-85 (E.D. Mich. 2001).

consideration has been to determine if Congress intended to create the particular federal right sought to be enforced. *See Suter*, 503 U.S. at 357, 112 S. Ct. at 1367 (stating issue as "did Congress, in enacting the Adoption Act, unambiguously confer upon the child beneficiaries of the Act a right to enforce the requirement that the State make 'reasonable efforts' to prevent a child from being removed from his home, and once removed to reunify the child with his family?"). Inasmuch as the Loschiavo court's approach first did not examine whether Congress intended to create the particular right at issue, we reject its holding that a federal right may be found in any federal regulation that, in its own right, meets the Blessing test.

Therefore, we follow Wright, in accordance with its actual holding, the teaching of *Sandoval*, and the holdings in Harris and Smith, which we believe the courts of appeals decided correctly, and hold that the EPA's disparate impact regulations cannot create a federal right enforceable through section 1983. To the extent, if any, that *Powell* might be thought on a superficial reading to suggest otherwise, in the light of *Sandoval* we cannot regard it as stating controlling law. Since the time of the Supreme Court's decision in *Sandoval*, it hardly can be argued reasonably that the right alleged to exist in the EPA's regulations, namely to be free of disparate impact discrimination in the administration of programs or activities receiving EPA assistance, can be located in either section 601 or section 602 of Title VI.

In reaching our result, we emphasize the following. *Sandoval* made it clear that section 601 proscribes intentional discrimination only. *See Sandoval*, 532 U.S. at ___, 121 S. Ct. at 1516. In discussing whether section 602 and its

implementing regulations created an implied right of action, the Court first considered whether Congress intended to create a federal right in favor of the plaintiffs.[11] *See id.* at ___, 121 S. Ct. at 1520-21. After reviewing the relevant language of section 602, the Court stated:

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[11] To adjudge whether an implied right of action exists under a particular statute, courts employ a four-factor test the Court first articulated in *Cort v. Ash*, 422 U.S. 66, 78, 95 S. Ct. 2080, 2088, 45 L. Ed. 2d 26 (1975). As the Court explained in Cannon:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted,' that is, does that statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiffs? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cannon, 441 U.S. at 688 n.9, 99 S. Ct. at 1953 n.9 (quoting *Tex. & Pac. R. Co. v. Rigsby*, 241 U.S. 33, 39, 36 S. Ct. 482, 484, 60 L. Ed. 874 (1916)) (citations and emphasis omitted). Although not expressly, the *Sandoval* Court began, and ended, its analysis with the first factor, namely whether Congress intended to create a right in favor of the plaintiffs. *See Sandoval*, 532 U.S. at ___, 121 S. Ct. at 1520-21.

It is immediately clear that the 'rights-creating' language so critical to the Court's analysis in Cannon of §601, is completely absent from §602. Whereas §601 decrees that 'no person . . . shall . . . be subjected to discrimination,' the text of §602 provides that 'each Federal department and agency . . . is authorized and directed to effectuate the provisions of [§601].' Far from displaying congressional intent to create new rights, §602 limits agencies to 'effectuating' rights already created by §601. And the focus of §602 is twice removed from the individuals who will ultimately benefit from Title VI's protection. Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.' Section 602 is yet a step further removed: it focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating. . . . So far as we can tell, this authorizing portion of §602 reveals no congressional intent to create a private right of action.

Nor do the methods that §602 goes on to provide for enforcing its authorized regulations manifest an intent to create a private remedy; if anything, they suggest the opposite. . . . Whatever these elaborate restrictions on agency enforcement may imply for the private enforcement of rights created outside of §602,

> they tend to contradict a congressional intent to create privately enforceable rights through §602.

Id. at ___, *121 S. Ct. at 1521* (citations omitted). Therefore, the Court found that there was no evidence of congressional intent to create new rights under section 602. *See id.* Rather, "§602 limits agencies to 'effectuating' rights already created by §601."[12]

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[12] It is important to note that relying upon the *Sandoval* Court's assessment of Congress' intent in enacting section 602, set forth in the context of determining whether there is a private right of action for the purposes of determining whether an enforceable right exists, does not, as the district court found, conflate the distinction between rights and remedies. *See South Camden II*, 145 F. Supp. 2d at 517 ("The essence of the NJDEP's and [St. Lawrence]'s misunderstanding of *Sandoval* lies in their conflation of rights with remedies in their analysis of the Supreme Court's holding in *Sandoval*."). It is true, as the district court repeatedly stated, that "the holding in *Sandoval* is explicitly limited to the determination that §602 itself does not create a right of private action," or in other words, a remedy. *Id.* at 518. It is also true, as the *Sandoval* Court stated and the district court emphasized, that this court is "bound by holdings, not language." *Sandoval*, 532 U.S. at ___, 121 S. Ct. at 1517. That being said, we are not precluded from utilizing the Court's discussion of Congress' intent in enacting Title VI, although raised in the context of whether Congress intended a remedy through section 602 directly, to help it discern whether Congress intended to create a right that is enforceable through section 1983. Doing so respects the difference between the Cort implied-right-of-action analysis and the Blessing "rights" analysis because it relies upon the factor common to both.

Inasmuch as the Court found previously that the only right conferred by section 601 was to be free of intentional discrimination, it does not follow that the right to be free from disparate impact discrimination can be located in section 602. In fact, it cannot. In sum, the regulations, though assumedly valid, are not based on any federal right present in the statute. Thus, this case is very similar to Smith and Harris. Here, as there, the regulations do more than define or flesh out the content of a specific right conferred upon the plaintiffs by Title VI. Instead, the regulations implement Title VI to give the statute a scope beyond that Congress contemplated, as Title VI does not establish a right to be free of disparate impact discrimination. Thus, the regulations are "too far removed from Congressional intent to constitute a 'federal right' enforceable under §1983." *Harris*, 127 F.3d at 1009.

Accordingly, if there is to be a private enforceable right under Title VI to be free from disparate impact discrimination, Congress, and not an administrative agency or a court, must create this right. In this regard, we point out what should be obvious: the scope of conduct subject to being interdicted by limitations on actions having a disparate impact is far broader than limitations on intentional discrimination. Thus, we reiterate that if Title VI is to go so far as to have the application that plaintiffs wish, Congress should take it there.

We emphasize that the implications of this case are enormous and obviously, as the appearance of the many amici curiae attests, have not been lost on interested parties. It is plain that in view of the pervasiveness of state and local licensing provisions and the likely applicability of Title VI to the agencies involved, the district court's opinion has the potential, if followed elsewhere, to subject vast aspects of

commercial activities to disparate impact analyses by the relevant agencies. Indeed, we noted in *Powell* that "at least 40 federal agencies have adopted regulations that prohibit disparate-impact discrimination pursuant to [section 602]." *Powell*, 189 F.3d at 393. While we do not express an opinion on whether that would be desirable, we do suggest that if it is to happen, then Congress and not a court should say so as a court's authority is to interpret rather than to make the law.[13]

IV. CONCLUSION

We sum up our conclusions as follows. The Supreme Court's primary concern in considering enforceability of federal claims under section 1983 has been to ensure that Congress intended to create the federal right being advanced. *See Suter*, 503 U.S. at 357, 112 S. Ct. at 1367; *Wright*, 479 U.S. at 431, 107 S. Ct. at 774. Accordingly, we hold that a

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[13] St. Lawrence and NJDEP raise numerous other procedural and substantive arguments in support of their appeals. In view of our result, with one exception, we do not address them as the appeal is only from the granting of preliminary injunction that we are reversing on other grounds. Nevertheless, it is possible that on further proceedings the issues involved in those arguments may be significant and thus we want to make it clear that we are taking no position on those points. The one exception is NJDEP's argument that the Eleventh Amendment bars this action to the extent that it "prohibits the retrospective revocation of [St. Lawrence's] air permit." Br. at 44. We are constrained to consider this argument as it is jurisdictional. *See Chittister v. Dep't of Cmty. and Econ. Dev.*, 226 F.3d 223, 227 (3d Cir. 2000). After careful consideration, we have concluded that the argument is without merit, and we therefore reject it without discussion.

federal regulation alone may not create a right enforceable through section 1983 not already found in the enforcing statute. Similarly, we reject the argument that enforceable rights may be found in any valid administrative implementation of a statute that in itself creates some enforceable right. Applying these rules here, it is clear that, particularly in light of *Sandoval*, Congress did not intend by adoption of Title VI to create a federal right to be free from disparate impact discrimination and that while the EPA's regulations on the point may be valid, they nevertheless do not create rights enforceable under section 1983. The district court erred as a matter of law in concluding otherwise and therefore also erred in finding that plaintiffs are likely to succeed on the merits of their claim. Consequently, we will reverse the district court's order of May 10, 2001, granting preliminary injunctive relief and will remand the case to the district court for further proceedings consistent with this opinion.

DISSENT

McKEE, Circuit Judge, dissenting:

Plaintiffs seek to enforce regulations promulgated under §602 of Title VI of the Civil Rights Act of 1963, 42 U.S.C. §2000-1. The validity of those regulations is not in dispute here. The regulations are set forth at 40 C.F.R. §7.10 et seq. and require the defendants to consider the potentially adverse disparate impact of air permits that St. Lawrence

needs to operate the proposed facility.[1]

The majority's decision to reverse the district court's grant of preliminary injunctive relief is based upon my colleagues' conclusion that the district court erred "as a matter of law . . . in finding that plaintiffs are likely to succeed on the merits of their claim." Maj. Op. at 37. However, our review here ought to be limited to determining if plaintiffs have established "a reasonable probability of succeeding on the merits. . . ." *ACLU v. Reno*, 217 F.3d 162, 173 (3d Cir. 2000) (emphasis added). We need look no further than our recent decision in *Powell v. Ridge*, (3d Cir.) *cert denied*, 528 U.S. 1046 (1999) to find the answer to that question. The majority correctly notes that the Supreme Court's subsequent decision in *Alexander v. Sandoval*, 531 U.S. 1049, 148 L. Ed. 2d 556, 121 S. Ct. 652 (2001), overruled part of our holding in *Powell*. However, *Powell* was not overruled in its entirety until today. Ironically, the majority overrules *Powell* by engaging in an analysis that overreads *Sandoval* while cautioning that "*Powell*, . . . should not be overread." Maj. Op. at 26. Accordingly, I respectfully dissent from the decision of my colleagues.

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[1] The extent to which plaintiffs have already suffered a disparate impact of pollution is readily apparent from the factual summary set forth by the majority. *See* Maj. Op. at 10 ("As a result, Waterfront South, though only one of 23 Camden neighborhoods, hosts 20 of the city's contaminated sites and, on average, has more than twice the number of facilities with permits to emit air pollution than exist in the area encompassed within a typical New Jersey zip code.").

I.

Before beginning my discussion I think it is important to define the parameters of our inquiry. First, "we must affirm unless we find the [district] court abused its discretion, committed an obvious error of law, or made a serious mistake in considering proof." *Bill Blass, Ltd v. SAZ Corp, et al*, 751 F.2d 152, 154 (3rd Cir. 1984) (emphasis added). Our analysis is not driven by factual issues. Accordingly, our inquiry turns on whether the district court committed an "obvious error of law." If it committed such an error, it abused its discretion in granting preliminary relief. If it did not commit such an error, preliminary relief was appropriate, and we must affirm. Second, there is no issue about the validity of the applicable regulations enacted pursuant to 42 U.S.C. §602. The majority assumes they are valid, just as the Supreme Court did in *Sandoval*. Third, it has long been the rule in this Circuit that decisions made in similar cases by panels of this Court are binding on other panels . . . . it is only through the Court En Banc that precedents established by earlier [published] panel decisions may be reexamined.

In the *Matter of The Central Railroad Co. of New Jersey*, 485 F.2d 208, 210 (3rd Cir. 1974). *See also Reich v. D.M. Sabia Co.*, 90 F.3d 854 (3rd Cir. 1996).

The majority concludes that the plaintiffs' action here is "legally insufficient" and that the district court therefore erred in granting preliminary injunctive relief, Maj. Op. at 14, because the disparate impact regulations plaintiffs seek to enforce are "too far removed from Congressional intent to constitute a 'federal right' enforceable under §1983." *Id.* at 35. Based upon that analysis, the majority concludes that

plaintiffs have no reasonable probability of success on the merits and are therefore not entitled to injunctive relief. This analysis not only ignores controlling precedent, it overrules it.

II.

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

Section 601 of Title VI provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. §2000d. The Supreme Court has held that §601 only reaches intentional discrimination. *See Sandoval*, 121 S. Ct. at 1516. However, §602 authorizes federal regulatory agencies to promulgate regulations under Title VI.

Section 602 provides, in relevant part:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d [Section 601] of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing financial assistance in connection with which the action is taken.

Id. §2000d-1. The regulations at issue here were promulgated under §602 and they proscribe discrimination that results from the disparate impact of certain activity. The Environmental Protection Agency is not alone in promulgating disparate-impact regulations under §602. In *Powell* we noted that "at least 40 federal agencies have adopted regulations that prohibit disparate-impact discrimination pursuant to this authority." 189 F.3d at 393.

We held in *Powell*, that the plaintiffs there could maintain an action under §1983 to enforce disparate impact regulations promulgated under §602 by the Department of Education that are virtually identical to the regulations promulgated by the Environmental Protection Agency that are

at issue here.[2] Plaintiffs in *Powell* brought an action against state officials challenging the funding mechanism for public education. They alleged, inter alia, that the defendants' method of funding education in the Commonwealth of Pennsylvania had a racially discriminatory impact in violation of Title VI and its implementing regulations.

The district court dismissed the complaint based upon its conclusion that the plaintiffs did not "adequately allege that a specific element of the Commonwealth's funding practices adversely and disproportionately affects students of a particular race." 189 F.3d at 393. On appeal, the defendants asserted an alternative ground for upholding the district court. They argued that the Title VI regulations did not provide an enforceable right. We resolved that inquiry by applying the four prong test established in *Cort v. Ash*, 422 U.S. 66, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975), and a similar inquiry set forth in *Angelastro v. Prudential-Bache Securities, Inc.* 764 F.2d 939 (3d Cir. 1985). *See Powell*. 189 F.3d at 397 ("It is by now well established that implication of a private right of action for a statute requires analysis of the factors set forth in Cort v. Ash."). We concluded that Title VI afforded plaintiffs a right to enforce the prohibition against disparate impact discrimination contained in the regulations promulgated pursuant to §602 of Title VI. We stated:

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[2] The regulation at issue in *Powell* was codified at 34 C.F.R. §100.3(b)(2) and it prohibited recipients of applicable federal funds from "utilizing criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, ..." 189 F.3d at 393.

> The regulation at issue here, although promulgated by the Department of Education under 602 of Title VI, implements §601 of Title VI. The Supreme Court precedent and our cases firmly establish that §601 of Title VI gives rise to an implied right of action, at least for our purposes for securing injunctive relief.

189 F.3d at 399. We also concluded that the remaining prongs of the relevant inquiry were satisfied and held that plaintiffs had therefore established "an implied private right of action to enforce the regulations promulgated under 602 of Title VI." *Id.* There is no question that that portion of our holding can not stand after the Supreme Court's pronouncement in *Sandoval*. That was the precise issue addressed in *Sandoval* and *Powell* was rendered a dead letter as to that issue. However, that was also the only issue decided in *Sandoval*. The Court's holding did not address Count II of the complaint that was before the court in *Powell*.

In *Powell*, we explained: "plaintiffs' second count invokes one of the Civil Rights Acts, 42 U.S.C. §1983 to address the defendants' alleged violation of the regulation." *Id.* We concluded that inasmuch as the complaint sought only injunctive and declaratory relief defendants were "persons acting under color of state law" under §1983. *Id.* at 401. We then cited *Blessing v. Freestone*, 520 U.S. 329, 137 L. Ed. 2d 569, 117 S. Ct. 1353 (1997) in stating that "once a plaintiff has identified a federal right that has allegedly been violated, there arises a rebuttable presumption that the right is enforceable under §1983.' " 189 F.3d at 401. Inasmuch as the relevant statute did not explicitly foreclose a suit under §1983, and since that statute clearly lacked a "comprehensive enforcement scheme that is incompatible with individual

enforcement under §1983," we concluded that plaintiffs could maintain an action to enforce the provisions of the regulations promulgated under §602 by resorting to §1983. We stated simply, "we see no reason to hold that resort to §1983 has been foreclosed here." *Id.* at 402.

The majority seizes upon that articulation of our holding to minimize the effect of what we said. My colleagues state: "*Powell* did not analyze the foundation issue that is central here, i.e. whether a regulation in itself can create a right enforceable under section §1983. In *Powell* we seemed simply to assume for section 1983 purposes that it could." Maj. Op. at 26-27. My colleagues then cite to *Powell* at 401 and note that we there stated, "Once a plaintiff has identified a federal right that has allegedly been violated, there arises a 'rebuttable presumption that the right is enforceable under §1983." Maj. Op. 27. I am frankly astounded by that analytical alchemy. The rebuttable presumption we referred to in *Powell* arises not because we "assumed" a cause of action under §1983, but precisely because we held there was a cause of action under §1983. *See Blessing*, 520 U.S. at 359. In Blessing, the Court was asked to determine if a plaintiff could enforce a right under §1983. That was the issue, and it was the only issue. The Court stated, "We granted certiorari to resolve disagreement among the Courts of Appeals as to whether individuals may sue state officials under §1983 for violations of Title IV-D." *Id.* at 339-40. The Court began that inquiry by citing *Maine v. Thiboutot*, 448 U.S. 1, 65 L. Ed. 2d 555, 100 S. Ct. 2502 (1980), wherein the Court had held that §1983 provided a remedy for violations of federal rights, not federal laws. The Blessing Court could not have been clearer in stating: "in order to seek redress through §1983, however, a plaintiff must assert the violation of a federal

right, not merely a violation of federal law." *Blessing*, 520 U.S. at 340 (emphasis in original). The Court then applied the three factor test set forth in *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 93 L. Ed. 2d 781, 107 S. Ct. 766 (1987), to determine if plaintiff had established a federal right. In doing so, the Court noted that if plaintiff had established such a right, it would be enforceable under §1983 unless Congress had foreclosed resort to §1983 either in the text of the applicable statute, or the comprehensive nature of the relevant statutory scheme. *Blessing*, 520 U.S. at 340. It is in this latter context that a presumption arises. Accordingly, there is a presumption that §1983 is available once a federal right (as opposed to a violation of federal law) is established. The presumption is rebutted if a defendant can establish that Congress expressed its intent (explicitly, or implicitly through the statutory scheme), that the statute not be enforceable under the general rubric of §1983.

It is true, as the majority notes, that much of our discussion in *Powell* was worded in terms of refuting defendant's assertion that plaintiffs could maintain a cause of action. The majority notes: that "[*Powell*] merely rejected . . . specific arguments. But *Powell* did not analyze the foundation issue that is central here, i.e. whether a regulation in itself can create a right enforceable under section 1983." Maj. Op. at 26-27. That assertion can not withstand even a cursory reading of *Powell*. The fact that we "merely rejected" defendant's arguments that §1983 does not allow a private cause of action to enforce the regulations does not negate the fact that the result of refuting those arguments was that we found plaintiffs had a cause of action under §1983, and that was part of our holding. The majority's attempt to suggest the contrary is tantamount to arguing that "merely rejecting" the

argument that 2 plus 2 does not equal 4 does not at the same time establish that 2 plus 2 does equal 4.

The sleight of hand that transforms our mention of a "presumption" in *Powell* into an assumption about the application of §1983 is even more puzzling when one considers that the majority's own analysis states that the relevant presumption does not arise unless the plaintiff can establish a federal right has been violated. My colleagues quite correctly state: "If a plaintiff . . . establishes and identifies a federal right that allegedly has been violated, a rebuttable presumption that the right is enforceable through section 1983 arises." Maj. Op. at 18 (citing Blessing). Therefore, the majority clearly recognizes that *Powell* concluded that the plaintiffs there had a federal right, arising from the regulations promulgated under Title VI, and that the right could be enforced under §1983 absent a demonstration that the cause of action was precluded by the text of Title VI, or the statutory scheme. We held that the defendants in *Powell* could not rebut the presumption. Moreover, the majority here correctly concedes that that was part of our holding in *Powell*, even while attempting to transform the holding into a mere assumption. *See* Maj. Op. at 13 ("In reaching its result the [district] court relied, inter alia on *Powell v. Ridge*, in which we held that there was a private right of action available to enforce a regulation implementing Title VI and that a disparate impact discrimination claim could be maintained under section 1983 for a violation of a regulation promulgated pursuant to section 602.") (emphasis added); *see also* Maj. Op. at 26 ("We answered both questions in the affirmative, stating that section 602 and the Department of Education regulation at issue provided a private right of action, and that plaintiffs could utilize section

1983 to redress defendant's alleged violation of the statute and regulation.") (emphasis added). As noted above, it is clear that the first part of our holding in *Powell* does not survive *Sandoval*. However, that is simply not true of the second part of the holding. *Sandoval* never discussed the §1983 issue.

In *Sandoval*, plaintiffs brought a class action against the Alabama Department of Public Safety in an attempt to enjoin the Department from administering drivers license examinations only in English. Plaintiffs alleged that administering the test in English to Spanish speaking residents had the effect of discriminating against them in violation of §601 of Title VI. The Court began its analysis by stating that it was clear from the Court's own decisions, Congress' amendments to Title VI, "and from the parties' concessions that three aspects of Title VI must be taken as given." 121 Sup. Ct. at 1516. These were that private individuals could sue to enforce the prohibition of intentional discrimination contained in §601, that §601 prohibits only intentional discrimination, and "we must assume for purposes of deciding this case that regulations promulgated under §602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under §601." *Id.* at 1516-17.

In writing for the majority and noting these three principles were taken as given, Justice Scalia observed that five justices of the Court had previously, in *Guardians Association v. Civil Serv. Comm'n of New York City*, 463 U.S. 582, 77 L. Ed. 2d 866, 103 S. Ct. 3221 (1983), voiced that latter principle "at least as alternative grounds for their decisions." *Sandoval* 121 S. Ct. at 1517. Justice Scalia noted that that position was "in considerable tension with the rule of

Bakke[3] and Guardians that §601 forbids only intentional discrimination. . . ." *Id.* However, inasmuch as the plaintiffs in *Sandoval* had not challenged the regulations and had asserted a claim only under §601, the Court, "for the purposes of deciding this case" assumed that the regulations proscribing disparate impact discrimination "are valid." *Id.* at 1517.

The question before the Court was, therefore, a very narrow one. The only issue was whether §602 created a free standing private cause of action to enforce regulations precluding disparate impact discrimination. As noted above, that was the only question that the Court granted certiorari to review. The Court answered that narrow inquiry as follows:

> "neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding proper right of action to enforce regulations promulgated under §602. We therefore hold that no such right of action exists."

121 Sup. Ct. at 1523.

The majority seizes upon the "language of *Sandoval*," to answer the very different inquiry posed by the district court's injunction here. The majority does so even while noting that the Court in *Sandoval* cautioned that "this Court is 'bound by holdings, not language.' " Maj. Op. at 35 n. 12

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[3] *Referring to Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978).

(quoting *Sandoval* 121 Sup. Ct. at 1517). The language of *Sandoval*, however, can not read an issue into that case that was not raised by the parties and not decided by the Court.

The issue here, simply stated, is whether §1983 provides an independent avenue to enforce disparate impact regulations promulgated under §602 of Title VI. That is the same question that was posed in *Powell*. We answered it in the affirmative in *Powell*, and the answer was not overturned by the subsequent holding in *Sandoval*. *Powell* therefore controls our inquiry here until overruled by the Supreme Court, or this court sitting en banc. *See Central Railroad*, 485 F.2d at 210. Clearly, the majority's decision is not based on any determination of the en banc court. Just as clearly, it is not based upon the holding in *Sandoval*, or *Powell*.

The majority reasons that inasmuch as the *Sandoval* majority did not find the requisite Congressional intent for a private cause of action in the statute there can be no enforceable right under §1983. *See* Maj. Op. at 37 ("Applying these rules here, it is clear that, particularly in light of *Sandoval*, Congress did not intend by adoption of Title VI to create a federal right to be free from disparate impact discrimination and that while the EPA's regulations on the point may be valid, they nevertheless do not create rights enforceable under section 1983.").

However,

This [an enforceable right under §1983] is a different inquiry than that involved in determining whether a private right of action can be implied in a particular statute. In right of action cases we employ the four-factor Cort test to

determine whether Congress intended to create the private remedy asserted for the violation of statutory rights. The test reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes. Because §1983 provides an alternative source of express congressional authorization of private suits, these separation-of-powers concerns are not present in a §1983 case. Consistent with this view, we recognize an exception to the general rule that §1983 provides a remedy for violation of federal statutory rights only when Congress has affirmatively withdrawn the remedy.

Wilder v. Virginia Hospital Assoc., 496 U.S. at 508 n.9 (1990) (emphasis added) (internal citations and internal quotation marks omitted) (citing *Sea Clammers*, 453 U.S. at 19.).

The majority in *Sandoval* did, in fact, apply the aforementioned Cort test for determining if a cause of action existed in the statute. The Court did not apply the Blessing test that is used under §1983 analysis.[4] This fact alone should cause my colleagues pause before "overreading" *Sandoval*.

Moreover, if we are to discount *Powell* on the grounds that *Powell* only assumed plaintiffs there had an actionable

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[4] Blessing requires, as its first element, that "Congress must have intended that the provision in question benefit the plaintiff." *Blessing*, 520 U.S. at 340. The *Sandoval* Court, on the other hand, asked in its private right of action inquiry, "whether it[section 602] displays an intent to create not just a private right but also a private remedy." *Sandoval*, 121 S. Ct. at 1519.

§1983 claim so too we must distinguish *Sandoval*--a case which is even one step more removed than *Powell* from the appropriate inquiry--as *Sandoval* did not even address §1983 to begin with.

Although my colleagues recognize in a footnote that the four justices who dissented in *Sandoval* believed that litigants could still bring a §1983 cause of action for violation of a Title VI disparate-impact regulation, the majority fails to give that fact the significance it deserves. *See* Maj. Op. at 17[5] The dissenting justices responded to the majority's conclusion that the plaintiffs in *Sandoval* could not bring a cause of action under Title VI by stating:

> to the extent that the majority denies relief to the respondents merely because they neglected to mention *42 U.S.C. § 1983* and framing their Title VI claim, this case is something of a sport. Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief; indeed, the plaintiffs in this case . . . presumably retain the option of rechallenging Alabama's English-only policy in a complaint that invokes § 1983 even after today's decision.

Sandoval at 1527.

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[5] *Referring to Alexander v. Choate*, 469 U.S. 287, 83 L. Ed. 2d 661, 105 S. Ct. 712 (1985).

In reaching our second holding in *Powell*, we also noted that Defendants' argument conflicts with the Supreme Court's own pronouncements. As previously noted, in Guardians five of the nine justices agreed that the administrative regulations incorporating a disparate impact standard are valid, *see* 463 U.S. at 584 n. 2, 607 n. 27, 103 S. Ct. 3221, and thereafter the Court in Alexander n5 characterized Guardians as so holding. *See Alexander*, 469 U.S. at 293, 105 S. Ct. 712 ("[Guardians] held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI."). Obviously, the Supreme Court did not believe that administrative regulations that prohibit disparate impact were an impermissible creation of substantive law, even though in its own earlier opinion in Guardians the Supreme Court had held that Title VI itself did not extend that far.

189 F.3d at 399-400.

Moreover, Supreme Court precedent affords additional support for the plaintiffs' claim here. In *Wright v. City of Roanoke Redevelopment & Hous. Auth., supra*, the plaintiffs brought an action under §1983 to enforce regulations that defined "rent" under the relevant statute. Defendants argued that the rights plaintiffs sought to enforce under §1983 were too amorphous and vague to confer an enforceable right under §1983. In rejecting that argument the Supreme Court proclaimed that "the regulations . . . have the force of law." 479 U.S. at 431.

The majority attempts to distance the instant inquiry from the analysis in Wright by arguing that the Court there

first examined the relevant statute and concluded that the statute, itself, conferred the right plaintiffs were seeking to enforce under §1983. Only upon making that determination, argues the majority, did the Court then conclude that the relevant regulations could properly define and flesh out the statutorily conferred right. The majority then concludes that, inasmuch as the relevant right here resides in the regulations, not Title VI, §1983 can not independently afford the relief that Congress did not provide for in the controlling statute. Maj. Op. at 24.

It is true that the Court in Wright ordered its analysis as the majority suggests. However, the Court stated that the regulation had the force of law as part of its Blessing analysis. Significantly, the Court applied that analysis not to the provisions of the statute, but to the regulation itself. Accordingly, Wright is consistent with, and supports, the plaintiffs' position here that the regulations themselves may give birth to a federal right so long as the regulations are valid.

In addition, the Supreme Court later interpreted Wright as finding an enforceable right in the interrelationship between the regulations and underlying statute. *See Wilder*, 496 U.S. at 511 ("In Wright, we found that the [statute] . . . and its implementing regulations did create rights enforceable under §1983."). Cases that we decided before *Powell* reached the same conclusion. *See Alexander v. Polk*, 750 F.2d 250 (3d Cir. 1984)).

In Polk, we concluded that the regulation at issue created an enforceable right. *See Polk*, 750 F.2d at 259 ("It is clear that 7 C.F.R. §246.24 created an enforceable right on

behalf of [plaintiffs] to be informed of the availability of fair hearings."). The majority attempts to reconcile today's opinion with Polk by stating that the right identified there could be "traced to and was consistent with the statute". Maj. op. at 25. We ought not dismiss Polk so easily however, given our pronouncement in *Powell*. Although we did not cite Polk in *Powell*, we were clearly aware of the Polk analysis, and it is consistent with our result in *Powell*. Furthermore, although Polk was decided before Blessing, it is clear that the analysis in Polk is consistent with a Blessing analysis, and the focus upon congressional intent. *See Polk*, 750 F.2d at 259 ("The provision was intended to safeguard the legal rights of WIC beneficiaries by informing them of fair hearing procedures.").

The regulations the South Camden plaintiffs are attempting to enforce can also be traced to Title VI. The majority focuses on the fact that §601 proscribes only intentional discrimination. Nevertheless, disparate-impact regulations may very well reflect an agency's practical considerations and definition of discrimination, just as "rent" was defined by the Department of Housing and Urban Development in the regulations in Wright . We cannot invalidate that regulatory definition without invalidating the regulations, and the majority claims that it is not doing that.[6]

Lastly, in keeping with the tendency to rely upon "language" that is favorable, and distinguish contrary

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[6] Although the majority snipes at the disparate-impact regulations, my colleagues concede they are valid for purposes of the instant analysis.

pronouncements as "dicta," the majority dismisses our decision in *West Virginia Univ. Hospitals v. Casey*, 885 F.2d 11 (3rd Cir. 1989) as "dicta." Maj. op. at 26. In Casey, we interpreted Wright and Polk as standing for the proposition that regulations, as well as statutes, can create rights that are enforceable under §1983. There we stated, "valid federal regulations as well as federal statutes may create rights enforceable under section 1983," and we cited *Wright and Polk*. 885 F.2d at 18. I readily concede that Casey involved only a statute, not regulations, and therefore, this statement was "dicta" just as the majority states. However, I think it noteworthy that my colleagues so readily dismiss statements from our own jurisprudence as "dicta" while relying upon dicta from cases that support its analysis and identifying the "dicta" as "teachings." *See* Maj. Op. at 32-33 ("we follow Wright, in accordance with its actual holding, the teaching of *Sandoval*, and the holdings in Harris and Smith, which we believe the courts of appeals decided correctly").

Of course, whether or not the plaintiffs would ultimately prevail on the merits is not the issue before us today. However, given controlling precedent in *Powell* I frankly fail to see how we can conclude that their chances of prevailing are anything less than reasonable. Moreover, their position has been adopted by our sister Court of Appeals for the Sixth Circuit. *See Loschiavo v. City of Dearborne*, 33 F.3d 548 (6th Cir. 1994), (holding that regulations promulgated under the Cable Communications Policy Act of 1984 created a right which plaintiff could enforce under 42 U.S.C. §1983, and relying upon *Wilder*, 496 U.S. at 520 and *Wright*, 479 U.S. at 432). The reasonableness of the plaintiffs' position is further underscored by the four dissenting justices in *Sandoval*. They noted:

> the majority declines to accord precedential value to Guardians because the five justices in the majority were arguably divided over the mechanism for which private parties might seek such injunctive relief.

121 Sup. Ct. at 1527.

CONCLUSION

Accordingly, for the reasons set forth herein, I respectfully dissent from the decision of the majority. I do readily concede that, given the pronouncements in *Sandoval*, the majority's opinion here has some force. However, the majority's opinion can not withstand scrutiny given *Powell*, as well as other cases that were not overruled by *Sandoval*. I believe that the district court was clearly correct in concluding that plaintiffs can demonstrate a "reasonable probability of success" on the merits.[7]

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[7] Inasmuch as the majority's analysis is limited to the first prong of the four part test for upholding a preliminary injunction I have not discussed whether plaintiffs have shown that they will be irreparably harmed by the denial of relief, whether granting the preliminary relief will result in even greater harm to the defendants or whether granting preliminary relief will be in the public interest. *See Allegheny Energy Inc. v. DQE, Inc.*, 171 F.3d 153, 158 (3d Cir. 1999) citing *ACLU v. Blackhorse Pike Regional Bd. Of Educ.*, 84 F.3d 1471, 1477 n.2 (3d Cir. 1996) (en banc)).

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 01-702

[Decided May 10, 2001]

SOUTH CAMDEN CITIZENS IN ACTION, GENEVA SANDERS, PAULINE WOODS, BARBARA PFEIFFER, JULITA GILLIARD, OSCAR LISBOA, SHIRLEY RIOS, PHYLLIS HOLMES, GWEN PETERSON, LATOYA COOPER, and JULIO LUGO,

Plaintiffs,

v.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROBERT C. SHINN, Commissioner of the New Jersey Department of Environmental Protection, in his official capacity,

Defendants,)
)
and)
)
ST. LAWRENCE CEMENT CO.,)
L.L.C.,)
)
Defendant-Intervenor.)
_____)

JUDGES:

BEFORE: STEPHEN M. ORLOFSKY, United States District Judge.

OPINION

I. INTRODUCTION

On April 19, 2001, this Court granted Plaintiffs' request for a preliminary injunction and a declaratory judgment based upon the allegation that the New Jersey Department of Environmental Protection ("NJDEP") and NJDEP Commissioner Robert Shinn ("Shinn") had violated §602 of Title VI of the Civil Rights Act of 1964, 40 U.S.C. §2000d-1, and the EPA's implementing regulations thereto, codified at 40 C.F.R. §7.10 et seq., by failing to consider the potential adverse, disparate impact of their decision to grant St. Lawrence Cement Co.'s ("SLC") application for air permits to operate its proposed facility. *See South Camden Citizens in Action ("SCCIA"), et. al. v. New Jersey Department of Environmental Protection, et. al., ("SCCIA I")*, 145 F. Supp. 2d 446, 2001 WL 392472 (D.N.J. 2001)(Orlofsky, J.). That determination was based upon the assumption that an implied private right of action existed

under §602 of Title VI, a cause of action which had recently been recognized in this Circuit in *Powell v. Ridge*, 189 F.3d 387 (3d Cir. 1999), *cert. denied*, 528 U.S. 1046, 120 S. Ct. 579 (1999). *SCCIA I*, 2001 WL 392472 at *24. I noted in *SCCIA I* that the precise question of whether an implied private right of action was available to enforce disparate impact regulations promulgated under Title VI was pending before the Supreme Court. *Id.*; *see Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999), *cert. granted*, 121 S. Ct. 28 (2000). I concluded, however, in *SCCIA I*, that I was bound by the Third Circuit's decision in *Powell* to recognize such a claim. *Id.*

On the morning of April 24, 2001, five days after this Court filed its Opinion and Order in *SCCIA I*, the Supreme Court held that §602 does not provide an implied private right of action to enforce disparate impact regulations promulgated by federal agencies pursuant to §602. *See Alexander v. Sandoval*, 532 U.S. 275, 149 L. Ed. 2d 517, 121 S. Ct. 1511, 2001 WL 408983 (2001).

On the afternoon of April 24, 2001, this Court convened a telephone conference call on the record with all counsel to address the impact of the Supreme Court's decision in *Sandoval* on this case. *See* Transcript of Conference Call I ("Trans. Conf. Call I"), April 24, 2001. In light of the Supreme Court's decision in *Sandoval*, the parties were asked to brief the following two questions: (1) Whether Plaintiffs are entitled to preliminary injunctive relief on the ground that the NJDEP and Commissioner Shinn intentionally discriminated against them on the basis of race, color, or national origin, in violation of §601 of Title VI of the Civil Rights Act of 1946, 42 U.S.C. §2000d; and (2) Whether

Plaintiffs are entitled to preliminary injunctive relief based upon 42 U.S.C. §1983,[1] specifically, whether the disparate impact regulations promulgated to enforce Title VI can be enforced through a §1983 action.

The Supreme Court's decision in *Sandoval* clearly held that private individuals can no longer sue directly under §602 to enforce the disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964. The question presented to this Court for the first time, and perhaps for the first time to any federal court, is whether the same disparate impact regulations which can no longer be enforced through a private right of action brought directly under §602 of Title VI, can be enforced pursuant to 42 U.S.C. §1983.

For the reasons set forth below, I conclude that: (1) the Supreme Court's decision in *Sandoval* does not preclude Plaintiffs from pursuing their claim for disparate impact discrimination, in violation of the EPA's implementing regulations to Title VI, under 42 U.S.C. §1983; and (2)

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[1] Section 1983 provides, in relevant part, as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

See 42 U.S.C. §1983.

Plaintiffs are entitled to preliminary injunctive relief based upon a claim for disparate impact discrimination in violation of the EPA's implementing regulations to Title VI, brought under 42 U.S.C. §1983.[2] Accordingly, SLC's motion to vacate this Court's Opinion and Order of April 19, 2001 (*SCCIA I*), granting Plaintiffs' application for a preliminary injunction, or in the alternative, seeking a stay of that Order pending appeal, is denied. Therefore, this Court's Order of April 19, 2001 shall remain in full force and effect.[3]

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[2] In light of this conclusion, I need not address at this time whether plaintiffs are entitled to preliminary injunctive relief based upon their claim of intentional discrimination in violation of §601 of Title VI.

[3] That Order provides, in relevant part, as follows:

1. Plaintiffs' motion for a preliminary injunction is granted;
2. The issuance of the air permits by the New Jersey Department of Environmental Protection to St. Lawrence Cement Co., L.L.C. is vacated;
3. St. Lawrence Cement Co., L.L.C. is enjoined from operating its proposed facility until further Order of this Court;
4. This case is remanded to the New Jersey Department of Environmental Protection and Commissioner Shinn to make appropriate findings consistent with the Opinion filed concurrently with this Order;
5. The findings made by the New Jersey Department of Environmental Protection and Commissioner Shinn shall be filed with this Court within thirty days of the date of this Order;
6. This Court shall retain jurisdiction of this case.

See Order, No. 01-702, April 19, 2001.

I incorporate the findings of facts and conclusions of law set forth in *SCCIA I* except as noted below. My application of the Third Circuit's test for preliminary injunctive relief is unchanged by this Supplemental Opinion, except insofar as I assumed, in *SCCIA I*, that Plaintiffs were entitled to bring a private cause of action under §602 itself, and have now concluded that Plaintiffs are entitled to assert the same claim under 42 U.S.C. §1983. In considering Plaintiffs' application for preliminary injunctive relief, I specifically note that the following findings of fact and conclusions of law set forth in *SCCIA I* are incorporated into, and unaltered by, this Supplemental Opinion: (1) Plaintiffs are likely to succeed on the merits of their claim that the NJDEP's facially neutral policy resulted in adverse disparate impact discrimination against Plaintiffs in violation of the EPA's Title VI implementing regulations; (2) Plaintiffs will suffer irreparable harm to their health and environment in the absence of an injunction; (3) Neither NJDEP, nor SLC will be irreparably harmed through the grant of preliminary injunctive relief; and (4) the granting of Plaintiffs' request for preliminary injunctive relief is in the public interest.

II. PROCEDURAL HISTORY

On April 19, 2001, this Court filed an Opinion and Order granting Plaintiffs' request for a declaratory judgment and preliminary injunctive relief. The facts and circumstances giving rise to this action are set forth in that Opinion, and will not be repeated here. *See SCCIA I*, 2001 WL 392472. In that Opinion, this Court applied the requisite four-factor test for determining whether to grant preliminary injunctive relief.

See SCCIA I, 2001 WL 392472 at *21, P 118.[4] Specifically, this Court found that Plaintiffs were likely to succeed on the merits of their claim that the NJDEP's permitting criteria and methods resulted in disparate impact discrimination in violation of §602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d-1. *SCCIA I*, 2001 WL 392472 at *21-48, PP 118-226. Furthermore, this Court found that Plaintiffs had demonstrated that they would suffer irreparable harm in the absence of injunctive relief, that neither NJDEP nor SLC will be irreparably injured by the grant of injunctive relief, and that the public interest favored granting the injunctive relief requested. *Id.*

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[4] As I stated in *SCCIA I*:

Before a District Court may grant preliminary injunctive relief in this Circuit, a court must weigh the following four factors: (1) the likelihood of the movant's success on the merits; (2) whether the movant will be irreparably injured if relief is not granted; (3) whether the party to be enjoined will suffer irreparable injury if the preliminary relief is granted; and (4) whether the public interest will be served by the preliminary injunctive relief. *See Doe v. Nat'l Bd. of Medical Examiners*, 199 F.3d 146, 154 (3d Cir. 1999) (quoting *American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1477 n. 2 (3d Cir.1996)) (en banc); In Re *Arthur Treacher's Franchisee Litigation*, 689 F.2d 1137, 1143 (3d Cir. 1982); *Association for Fairness, Inc. v. New Jersey*, 82 F. Supp. 2d 353, 359 (D.N.J. 2000) (Orlofsky, J.).

SCCIA I, 145 F. Supp. 2d 446, 470-71, 2001 WL 392472 at *21, P 118.

On April 24, 2001, five days after this Court rendered its decision in *SCCIA I*, the Supreme Court issued a decision in *Alexander v. Sandoval*, 532 U.S. 275, 149 L. Ed. 2d 517, 121 S. Ct. 1511, 2001 WL 408983 (2001). In *Sandoval*, Justice Scalia, writing for a five-four majority of the Supreme Court, held that "neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under §602. We therefore hold that no such right of action exists." 532 U.S. 275, 149 L. Ed. 2d 517, 121 S. Ct. 1511, 2001 WL 408983 at *10. With this holding, the Supreme Court clearly overruled that portion of the Third Circuit's decision in *Powell* which held that an implied right of action existed under §602. To the extent that this Court's analysis in *SCCIA I* was predicated on *Powell's* holding that §602 provides an implied private right of action to enforce the regulations promulgated under §602, the Supreme Court's decision in *Sandoval* also overruled this Court's opinion in *SCCIA I*.

Within hours of the Supreme Court's issuance of the *Sandoval* decision, this Court convened a telephone conference call with all counsel in this case to discuss the impact of *Sandoval* on this Court's holding in *SCCIA I*. *See* Trans. Conf. Call I. All Counsel agreed with this Court that the Supreme Court's decision in *Sandoval* overruled the Third Circuit's decision in *Powell*, upon which this Court had relied in reaching its decision in *SCCIA I*, specifically, that §602 contains an implied private right of action. Trans. Conf. Call I at 11.

Counsel for SCCIA argued, however, that the preliminary injunction issued by this Court on April 19, 2001,

should remain in effect because Plaintiffs were entitled to preliminary injunctive relief, notwithstanding the Supreme Court's decision in *Sandoval*. First, Plaintiffs argued that their claim for intentional discrimination, brought under §601, provided a basis for this Court's continuance of the preliminary injunction. Second, citing Justice Stevens' dissenting opinion in *Sandoval*, Plaintiffs contended that their claim of disparate impact discrimination, originally brought under §602, could be brought under U.S.C. §1983. Trans. Conf. Call I at 3.

Counsel for SLC argued that the preliminary injunction issued by this Court in *SCCIA I* should be vacated by this Court sua sponte in light of the Supreme Court's decision in *Sandoval*, pursuant to Federal Rule of Civil Procedure 60(b). Trans. Conf. Call I at 5.

Counsel for NJDEP concurred. *Id.* at 6-7. In the alternative, counsel for SLC requested that this Court stay its injunction, pending the disposition of a motion for reconsideration. *Id.* at 9.

After hearing arguments from counsel for SCCIA, NJDEP, and SLC, this Court instructed the parties to file supplemental briefs analyzing the impact of the Supreme Court's decision in *Sandoval* on Plaintiffs' Complaint. Trans. Conf. Call I at 10-12, 16. The Court gave the parties until 9:00 a.m., Thursday, April 26, 2001, or approximately thirty-six hours from the time of the conference call, to submit their supplemental briefs. *Id.* at 24-25. Finally, the Court indicated that, since the Court and all parties were aware of the Court's obligation to reconsider its decision in *SCCIA I* in light of the Supreme Court's decision in *Sandoval*, the Court would not

require SLC to go through the formality of filing a motion for reconsideration. *Id.* at 23.

On April 25, 2001, SLC filed an Order to Show Cause for Preliminary Injunction Pending Appeal and a motion to Vacate Opinion and Order or, in the alternative, for Stay of Order Pending Appeal. *See* Order to Show Cause, No. 01-702 (filed April 25, 2001). In the brief it submitted in support of the Order to Show Cause for Preliminary Injunction Pending Appeal and the Motion to Vacate or, Stay, SLC argued that the Supreme Court's decision in *Sandoval* mandated that this Court immediately vacate its Opinion and Order in *SCCIA I*.

On April 25, 2001, Plaintiffs filed a motion for leave to amend their complaint to allege a cause of action for disparate impact discrimination, in violation of the EPA's Title VI implementing regulations, codified at 40 C.F.R. §7.10 et seq, based on 42 U.S.C. §1983. *See* Pls.' Motion for Leave to Amend Complaint, No. 01-702 (filed April 25, 2001).

On the afternoon of April 25, 2001, this Court convened a second telephone conference call on the record to address these motions. *See* Transcript of Conference Call II ("Trans. Conf. Call II"), April 25, 2001. With respect to Plaintiffs' motion for leave to amend their Complaint, the Court considered Plaintiffs' argument that leave should be granted in the interest of justice, and SLC's argument in opposition that leave to amend should be denied based on the prejudice SLC would suffer if the motion were granted. Trans. Conf. Call II at 2-3, 6-16. After considering the arguments of counsel, the Court concluded that Plaintiffs'

motion to amend would not cause any legal prejudice to Defendants. Specifically, the Court noted that the Plaintiffs' proposed amendment was a technical amendment asserting an alternative legal basis for the relief sought in Plaintiffs' original Complaint, and would not require the presentation of any additional evidence. *Id.* at 13-22. The Court further concluded that the prejudice identified by counsel for SLC, namely, the economic harm SLC would suffer from the continuance of the injunction, is not the kind of prejudice which would defeat a motion for leave to amend under Federal Rule of Civil Procedure 15(a), which mandates that leave to amend "be freely given when justice so requires." *Id.* 13-14 (citing *Foman v. Davis*, 371 U.S. 178, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962) and Fed. R. Civ. P. 15(a)). Accordingly, this Court granted Plaintiffs' motion for leave to amend their Complaint to assert a cause of action under 42 U.S.C. §1983, alleging the discriminatory impact of NJDEP's permitting practices under the EPA's implementing regulations to Title VI of the Civil Rights Act of 1964.

With respect to SLC's Order to Show Cause and Motion to Vacate or Stay, the Court explained that it was fully aware of its obligation to reconsider its decision in *SCCIA I* in light of the Supreme Court's decision in *Sandoval*, and was proceeding to do so as expeditiously as possible. Trans. Conf. Call II at 26. As this Court explained:

I am resolving [the question of whether to dissolve or stay the preliminary injunction] as part of this process. I hope to render a decision as quickly as possible. I can't tell [counsel] how quickly I'm going to do it until I read your papers, but since [counsel] raised it, I think I ought to address it. There are serious public health issues presented in this case

and to vacate ... without giving plaintiffs an opportunity--or vacate the injunction or stay the injunction and allow the plant to begin operations without giving the plaintiffs an opportunity to demonstrate to me that they're entitled to preliminary injunctive relief based on the existing record, it seems to me, raises serious issues with regard to the public health of the citizens of Waterfront South.

I assure [counsel for SLC and SLC] that I am moving as expeditiously as possible. We had a conference call within hours of the Supreme Court's decision in the *Sandoval* case. I established a briefing schedule of tomorrow morning at 9 o'clock. Frankly, I would have been ready to proceed even faster than that, but [counsel for SCCIA] indicated that she had other commitments that she couldn't put off. Now, it seems to me that it's almost exalting form over substance for me to set down a return date for an order to show cause. I'm considering all those issues already. I was considering them before [counsel for SLC] filed the papers. I'm simply waiting for the brief on the merits, and as I read the brief that [counsel for SLC] submitted in support of the order to show cause, it really doesn't address the merits of plaintiffs' claims. It simply addresses the fact that the *Sandoval* decision of the Supreme Court overruled the basis for my decision because there is no longer a private right of action under Title VI. I mean, there is no dispute about that. And if that were the only claim in the case, I would have vacated the injunction yesterday.

* * * *

I am not going to set a return date for the order to show cause. I am considering the issues raised in the order to

show cause as we speak. I was considering them before [counsel for SLC] filed the papers, and to me this was an unnecessary exercise. I understand that [SLC] insisted that [counsel for SLC] file the papers, but of course I'm considering those issues. I didn't ask [counsel for SLC] to file a motion for reconsideration, and I didn't ask [counsel for SCCIA] to file a formal motion to have a return date on the motion to amend. I'm trying to move this as quickly as possible. But, certainly, I'm considering the issues which [counsel for SLC] raised in the order to show cause. I don't think it's necessary to set a return date.

Now, what I will do . . . is that after I receive the papers tomorrow and I've had a chance to read them and you've all had the chance to read your adversary's papers, if you want argument, if you want to come down and argue, I'll be happy to schedule oral argument. But I read your papers already on the order to show cause . . . and I'm already considering those issues.

Id. at 26-28.

III. DISCUSSION

A. Introduction

This Supplemental Opinion sets forth the Court's conclusions of law regarding the impact of the Supreme Court's decision in *Sandoval* on this Court's opinion in *SCCIA I*. I incorporate by reference the findings of fact and conclusions of law set forth in *SCCIA I*, with the exception of those conclusions of law relating to the existence of a private

right of action under §602 of Title VI, which have been overruled by *Sandoval*.

B. The Supreme Court's Decision in *Sandoval*

In order to determine the impact of the Supreme Court's decision in *Sandoval* on this case, I must first consider the precise holding in *Sandoval*. As Justice Scalia pointedly reminded us in the majority Opinion he authored in *Sandoval*, courts are "bound by holdings, not language." *Sandoval,* 532 U.S. 275, 2001 WL at 408883 at *5. With Justice Scalia's admonition in mind, I shall now examine the Supreme Court's holding in *Sandoval* in detail, in an effort to determine its impact on this case.

Sandoval involved a class action claim brought by non-English-speaking residents of the State of Alabama against the Director of the Alabama Department of Public Safety, alleging that because the Alabama Department of Public Safety offered Alabama's driver's licensing exam only in English, the class suffered disparate impact discrimination on the basis of their national origin in violation of Title VI of the Civil Rights Act of 1964, and the implementing regulations promulgated pursuant to §602 by the Departments of Justice and Transportation. *Sandoval*, 532 U.S. 275, 149 L. Ed. 2d 517, 121 S. Ct. 1511, 2001 WL 409983 at *3.

Section 601 of Title VI provides that no person shall, "on the ground of race, color, or national origin, be denied the benefits of, or be subjected to discrimination under any program or activity" covered by Title VI. 42 U.S.C. §2000d. Section 602 of Title VI authorizes federal agencies to "effectuate the provisions of [§601] . . . by issuing rules,

regulations, or orders of general applicability." 42 U.S.C. §2000d-1.

Both the Department of Justice and the Department of Transportation have promulgated implementing regulations to Title VI of the Civil Rights Act of 1964, pursuant to § 602. *See* 28 C.F.R. §42.104(b)(2) (DOJ regulations) and 49 C.F.R. §21.5(b)(2) (DOT regulations). These regulations prohibit recipients of federal funds from, inter alia, "utilizing criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin." 28 C.F.R. §42,104(b)(2). Because the Alabama Department of Public Safety accepts grants of financial assistance from the United States Department of Transportation and the United States Department of Justice, it is subject to Title VI. *Sandoval*, 532 U.S. 275, 2001 WL at 408883 at *3.

In *Sandoval*, the plaintiff class asserted its claim for disparate impact discrimination exclusively as a private right of action under §602 of Title VI. *See Sandoval v. Hagan*, 7 F. Supp. 2d 1234, 1253 n.15 (M.D. Ala. 1998) ("The plaintiffs in the case at bar are not asserting Title VI rights via §1983. Rather, Plaintiffs contend that they have a direct cause of action under Title VI and its implementing regulations.") Their claim was premised on the theory that §602: (1) permits the promulgation, by federal agencies, of implementing regulations which prohibit disparate impact discrimination; and (2) affords an implied private right of action to private individuals to file suit in federal court to enforce such implementing regulations.

As Justice Scalia plainly stated in his majority Opinion in *Sandoval*, the Supreme Court's decision in *Sandoval* addressed only the second of the plaintiffs' theories concerning §602: "the petition for writ of certiorari raised, and we agreed to review, only the question posed in the first paragraph of this opinion: whether there is a private cause of action to enforce the [implementing] regulation." *Sandoval*, 532 U.S. 275, 149 L. Ed. 2d 517, 121 S. Ct. 1511, 1515, 2001 WL 408983 at *3. The Supreme Court "[did] not inquire [in *Sandoval*] whether the DOJ regulation was authorized by §602, or whether the courts below were correct to hold that the [contested policy] had the effect of discriminating on the basis of national origin." *Id.* Instead, the Court stated that:

> We must assume for purposes of deciding this case that regulations promulgated under §602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even through such activities are permissible under §601. Though no opinion of this Court has held that, five justices in Guardians voiced that view of the law at least as alternative grounds for their decisions, *see*[Guardians Asso. v. Civil Service Com.] 463 U.S. [582] at 591-92, [103 S. Ct. 322, 177 L. Ed. 2d 866 (1983)] (opinion of White, J.); *id.* at 623, n. 15 (Marshall, J., dissenting); *id.* at 643-645 (Stevens, J. joined by Brennan and Blackmun, JJ., dissenting), and dictum in Alexander v. Choate is to the same effect, *see* 469 U.S. [287,] 293, 295, n.11, [105 S. Ct. 712, 83 L. Ed. 2d 661]. These statements are in

> considerable tension with the rule of Bakke and Guardians that §601 forbids only intentional discrimination, *see, e.g. Guardians Assn. v. Civil Serv. Comm'n of New York City, supra,* [463 U.S.] at 612-613 (O'Connor, J., concurring in judgment), but petitioners have not challenged the regulations here. We therefore assume for the purposes of deciding this case that the DOJ and DOT regulations proscribing activities that have a disparate impact on the basis of race are valid.

Sandoval, 532 U.S. 275, 149 L. Ed. 2d 517, 121 S. Ct. 1511, 1517, 2001 WL 408983 at *4 (emphasis added).

Having thus defined the scope of its review, the majority in *Sandoval* proceeded to analyze two sources of law in order to determine whether Congress intended to create a private right of action under §602: (1) Supreme Court precedent interpreting Title VI; and (2) the text and structure of Title VI itself.

First, the Court reviewed its holdings in the seminal cases of *Lau v. Nichols*, 414 U.S. 563, 39 L. Ed. 2d 1, 94 S. Ct. 786 (1974) (holding that §601 prohibits disparate impact discrimination); *Cannon v. University of Chicago*, 441 U.S. 677, 694, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979) (holding that a private right of action exists to enforce Title IX, which is "patterned after Title VI,"); *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978) (holding that §601 proscribes only intentional discrimination); *Guardians Ass'n v. Civil Serv. Comm'n of New York City*, 463 U.S. 582, 77 L. Ed. 2d 866, 103 S. Ct.

3221 (1983) (affirming Bakke's holding that §601 prohibits only intentional discrimination); and *Alexander v. Choate*, 469 U.S. 287, 83 L. Ed. 2d 661, 105 S. Ct. 712 (1985) (same). *See Sandoval*, 532 U.S. 275, 149 L. Ed. 2d 517, 121 S. Ct. 1511, 2001 WL 408983 at *5-8. Based on its analysis of the holdings in these cases, the Supreme Court concluded that "neither [Guardians], nor any other [case] in this Court, has held that the private right of action exists." *Id.* at *5.

The Court then considered the text and structure of Title VI. First, the Court reviewed §602's language that federal agencies may "effectuate" §601, and held that "so far as we can tell, this authorizing portion of §602 reveals no congressional intent to create a private right of action." *Id.* at *8. Second, the Court considered the methods that §602 provides for enforcement, namely, either the termination of "funding to the 'particular program, or part thereof,' that has violated the regulation or [enforcement] 'by any other means authorized by law,'" and concluded that these methods do not "manifest an intent to create a private remedy." *Sandoval*, 532 U.S. 275, 149 L. Ed. 2d 517, 121 S. Ct. 1511, 1521, 2001 WL 408983 at *9 (citing 42 U.S.C. §2000d-1). After reviewing various restrictions on agency enforcement of §602, the Court concluded that these restrictions "tend to contradict a congressional intent to create privately enforceable rights through §602 itself." *Id.* at *9. Third, the Court considered and rejected plaintiffs' argument that the regulations must be privately enforceable because they contain rights-creating language, stating that "language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not." *Id.* Finally, the Court considered plaintiffs' argument that Congress "ratified" a

jurisprudentially-created private cause of action under §602 in amendments to Title VI which Congress passed in 1986 and 1987. *See* Rehabilitation Act Amendments of 1986, §1003, 42 U.S.C. §2000d-7; Civil Rights Restoration Act of 1987, §6, 42 U.S.C. §2000d-4a. The Court rejected this argument, based on: (1) its conclusion that its jurisprudence never created such a right; and (2) its conclusion that congressional intent to "ratify" a private cause of action could not be inferred from the fact that Congress was silent on this issue when it enacted the comprehensive revisions to Title VI which were contained in the 1986 and 1987 amendments. *Id.* at *10.

Based on the foregoing analysis, Justice Scalia, writing for the majority, concluded with the following unequivocal statement of the Court's holding in *Sandoval*: "Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under §602. We therefore hold that no such right of action exists." *Id.*

C. Whether Plaintiffs May Assert a Claim for Disparate Impact Discrimination, in Violation of the EPA's Implementing Regulations Promulgated Pursuant to §602, under 42 U.S.C. §1983

1. *Sandoval* Does Not Foreclose the Possibility of Such a Claim

This Court undertook the preceding analysis of the Supreme Court's Opinion in *Sandoval* to divine exactly what the Court held in *Sandoval*, in an effort to determine the impact of *Sandoval* upon this case. The foregoing analysis,

however, is equally valuable insofar as it illuminates what the Supreme Court did not hold in *Sandoval*.

Specifically, upon a careful review of Justice Scalia's majority opinion in *Sandoval*, it is clear that the impact of the Supreme Court's holding in *Sandoval* on this case is limited to its holding that §602 of Title VI does not create an implied private cause of action to enforce agency regulations promulgated under §602 which prohibit disparate impact discrimination. I reach this conclusion for four reasons. First, as Justice Scalia repeatedly emphasized, the petition for certiorari presented, and the Supreme Court reviewed, only the question of whether §602 itself creates what Justice Scalia termed a "freestanding," or independent, private right of action. *See Sandoval*, 532 U.S. 275, 149 L. Ed. 2d 517, 121 S. Ct. 1511, 2001 WL 408983 at *3, *4, *6 and *10. Second, Justice Scalia took pains to point out that because the validity of the Title VI implementing regulations promulgated by the DOJ and DOT were not contested in *Sandoval*, the Court's holding in *Sandoval* does not address or invalidate the disparate impact regulations promulgated under §602 of Title VI, or the many cases in which the Supreme Court has assumed such a right exists. *Id.* at *4. As he noted repeatedly:

We do not inquire here whether the DOJ regulation was authorized by §602. *Id.* at *3;

We must assume for purposes of deciding this case that regulations promulgated under §602 may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under §601. *Id.* at *4;

As stated earlier, we assume for the purposes of this decision that §602 confers the authority to promulgate disparate-impact regulation; the question remains, whether it confers a private right to enforce them. *Id.* at *6.

Third, the Court limited the question decided in *Sandoval* to determining whether Congress intended to create a private remedy to enforce §602, while assuming that in fact Congress intended that statute, to create a substantive right: "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent not just to create a private right, but also a private remedy." *Id.* at *7 (citation omitted). Finally, a careful review of the Supreme Court's jurisprudence on the issue of implied remedy, beginning with the Court's holding twenty years ago in *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Assoc.*, 453 U.S. 1, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981), cited by the Supreme Court in *Sandoval*, 532 U.S. 275, 149 L. Ed. 2d 517, 121 S. Ct. 1511, 2001 WL 408983 at *9, reveals the Court's recognition of the critical distinction in the judicial analysis required to divine Congressional intent to create such a private right of action, and the very different question of Congressional intent to create such a remedy via, for example, §1983.

For example, in *Nat'l Sea Clammers Assoc.*, 453 U.S. at 13-20, the Court considered both the question of whether the statute at issue in that case afforded an implied private right of action, and, alternatively, whether the same statute could provide the basis for a §1983 action:

> Where, as here, Congress has made it clear that implied private actions are not

> contemplated, the courts are not authorized to ignore this legislative judgment. Although the parties have not suggested it, there remains a possible alternative source of express congressional authorization of private suits under these Acts . . . it could be argued that respondents may sue the municipalities and sewerage boards among the petitioners under [the Acts] by virtue of a right of action created by §1983 . . . . If controlling, this argument would obviate the need to Consider whether Congress intended to authorize private suits to enforce these particularly federal statutes.

Id. at 18-19.

Significantly, for the purposes of this case, it is clear for the reasons I have just explained that the *Sandoval* opinion does not, as NJDEP and SLC argue, prevent Plaintiffs in this case from pursuing any cause of action involving §602. *See* NJDEP Suppl. Br. at 6; SLC Suppl. Br. at 22. More specifically, *Sandoval* does not foreclose Plaintiffs from seeking to vindicate the rights they allege §602 and its implementing regulations create through §1983. In arguing to the contrary, both NJDEP and SLC urge this Court to interpret *Sandoval* in a way which goes well beyond the narrow holding in that case. The essence of the NJDEP's and SLC's misunderstanding of *Sandoval* lies in their conflation of rights with remedies in their analysis of the Supreme Court's holding in *Sandoval*.

Specifically, the NJDEP and SLC argue that in *Sandoval*, the Court held that individual plaintiffs are entirely

foreclosed from bringing any cause of action based upon alleged violations of the disparate impact implementing regulations promulgated under §602. To support this argument, the NJDEP cites to the following language: "Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under §602. We therefore hold that no such right of action exists." NJDEP Suppl. Br. at 6 (citing *Sandoval*, 532 U.S. 275, 149 L. Ed. 2d 517, 121 S. Ct. 1511, 2001 WL 408983 at *10). As is evident from the very text the NJDEP cites, however, and for the reasons I have already discussed in detail, *Sandoval*'s holding is limited to the question of whether, in Justice Scalia's words, a "freestanding private right of action" exists under §602.

SLC directs this Court's attention to a different section of Justice Scalia's majority Opinion, an analysis of which, it argues, mandates the same conclusion, namely, that *Sandoval* precludes Plaintiffs in this case from pursuing this cause of action under §1983:

> Whereas §601 decrees that 'no person. . . shall. . . be subjected to discrimination,' the text of §602 provides that '[each Federal department and agency. . . is authorized and directed to effectuate the provisions of [§601].' Far from displaying congressional intent to create new rights, §602 limits agencies to "effectuating rights already created by §601."

SLC Suppl. Br. at 24 (citing *Sandoval*, 532 U.S. 275, 149 L. Ed. 2d 517, 121 S. Ct. 1511, 2001 WL 408993 at *8).

SLC's argument is flawed for several reasons. First, this Court must be guided by Justice Scalia's admonition in *Sandoval*, that courts are bound by "holdings, not language." That admonition prohibits this Court from reading the dicta cited by SLC to be part of the holding in *Sandoval*. Moreover, as I have already explained in detail, the Court in *Sandoval* did not reverse the plurality's holding in Guardians, that the disparate impact regulations at issue in that case should be upheld. Instead, in *Sandoval*, the Court explicitly assumed the validity of the §602 implementing regulations. Finally, I note that the portion of the *Sandoval* opinion which SLC quotes, when read in context, is part of the Court's consideration of the question of Congressional intent to create a private right of action in §602 itself, and is not dispositive of the question of whether a cause of action to enforce the §602 regulations may be asserted under §1983.

The holding in *Sandoval* is explicitly limited to the determination that §602 itself does not create a right of private action. Therefore, I conclude, as a threshold matter, that the Court's holding in *Sandoval* does not foreclose Plaintiffs in this case from bringing a claim for disparate impact discrimination, in violation of the EPA's §602 implementing regulations, under 42 U.S.C. §1983.

This conclusion is consistent with governing precedent in the Third Circuit, specifically, *Powell v. Ridge*, 189 F.3d 387 (3d Cir. 1999), in which the Court held that plaintiffs seeking to enforce the disparate impact regulations promulgated under §602 may do so by bringing suit under §602 itself and/or by bringing suit under 42 U.S.C. §1983. *Powell*, 189 F.3d at 403. While it is clear that the Third Circuit's holding that §602 itself contained an implied private

right of action has been overruled by *Sandoval*, it is equally clear that *Sandoval* did not address, nor does it affect, Plaintiffs' right to bring a claim for disparate impact discrimination in violation of the §602 regulations under §1983. The Third Circuit's analysis in Powell includes an extensive discussion of the Powell plaintiffs' ability to assert a claim for violation of the §602 regulations under §1983. *See Powell*, 189 F.3d at 399-403. For the reasons I have already set forth, the Third Circuit's analysis of §1983 in Powell is not affected or overruled by the Supreme Court's ruling in *Sandoval* and remains the governing law of this Circuit. Accordingly, this Court is bound to follow it.

2. The Governing Legal Standard for Determining Whether a "Right" May Be Enforced Under §1983

Having concluded that the Supreme Court's opinion in *Sandoval* does not preclude the SCCIA plaintiffs from asserting a §1983 action for disparate impact discrimination in violation of the EPA's §602 implementing regulations, I must now consider whether Plaintiffs may in fact pursue such a claim under §1983. Section 1983 provides, in relevant part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

> action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. §1983. In this case, Plaintiffs must first demonstrate that their Complaint meets the statutory requirements of §1983, by showing that they have asserted their claim against a "person," who, "under color of state law," deprived Plaintiffs of "rights, privileges, or immunities secured by the Constitution and laws" of the United States.

The Supreme Court has explained that, once plaintiffs seeking a remedy under §1983 demonstrate that they can meet the requisite statutory elements for a §1983 claim:

> [A] determination that §1983 is available to remedy a statutory or constitutional violation involves a two-step inquiry. First, the Plaintiff must assert the violation of a federal right. . . . Second, even when the plaintiff has asserted a federal right, the defendant may show that Congress "specifically foreclosed a remedy under §1983," by providing a "comprehensive enforcement mechanism for protection of a federal right."

Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 106, 107 L. Ed. 2d 420, 110 S. Ct. 444 (1989) (citations omitted). With respect to the first part of this inquiry, the Court has emphasized that "in order to seek redress through §1983, [] a plaintiff must assert the violation of a federal right, not merely a violation of federal law."

Blessing v. Freestone, 520 U.S. 329, 340, 137 L. Ed. 2d 569, 117 S. Ct. 1353 (1997) (citation omitted) (emphasis in original). To determine whether a federal statute creates an individual right, the Court utilizes a three-part analysis, most recently articulated in *Blessing*, 520 U.S. at 340-41:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

Blessing, 520 U.S. at 340-341 (citations omitted). Describing this analysis in *Livadas v. Bradshaw*, the Court explained that "apart from [some] exceptional cases, §1983 remains a generally and presumptively available remedy for claimed violations of federal law." 512 U.S. 107, 132, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994).

If, upon application of the Blessing analysis, a court finds that plaintiffs have identified a federal right which has allegedly been violated, a rebuttable presumption is created that the right is enforceable under §1983. *Blessing*, 520 U.S. at 341. The presumption in favor of allowing Plaintiffs to proceed under §1983, arises because, in recognition of Congress's express intent to allow individuals the opportunity to vindicate federal rights through §1983, courts "do not lightly conclude that Congress intended to preclude reliance on §1983 as a remedy for the deprivation of a federally secured right." *Wright v. City of Roanoke*, 479 U.S. 418,

423-24, 93 L. Ed. 2d 781, 107 S. Ct. 766 (1987) (citation omitted); *see also Golden State Transit Corp.*, 110 S. Ct. at 448 (stating that "we have repeatedly held that the coverage of §1983 must be broadly construed.")

The Third Circuit, applying Blessing, has explained the two conditions which are sufficient to rebut this presumption: "the presumption is rebutted 'if Congress specifically foreclosed a remedy under §1983, [either] expressly, by forbidding recourse to §1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under §1983." *Powell*, 189 F.3d at 401 (citations omitted). If Congress has expressly prohibited the use of §1983 to enforce the right plaintiffs have identified, plaintiffs' §1983 claim must fail. Otherwise, the burden is upon the defendant, to "make the difficult showing that allowing a §1983 action to go forward in these circumstances 'would be inconsistent with Congress' carefully tailored scheme.'" *Id. See also West Va. Univ. Hosp., Inc. v. Casey*, 885 F.2d 11, 18 n.1 (3d Cir. 1989) (explaining that "under §1983 analysis, on the other hand, once a federal right is established, the existence of a remedy is presumed because §1983 itself provides the authorization for private enforcement.")

Based upon the Supreme Court's holding in Blessing, the inquiry now before this Court is whether, applying the three-factor test the Supreme Court articulated in Blessing, Plaintiffs in this case can demonstrate that §602, and specifically, the implementing regulations promulgated by the EPA thereunder, give rise to a federal right enforceable under §1983. If this Court finds that there is such a right, then the burden shifts to the NJDEP and SLC to show that the

remedial scheme envisioned by Title VI's implementing regulations is so comprehensive as to foreclose the enforcement of that right under §1983.

3. The Differences Between the Cort v. Ash Implied Right of Action Test and the Blessing v. Freestone § 1983 Test

As the Supreme Court has observed, the inquiry whether an action may be brought under §1983 is separate and distinct from the inquiry courts must perform to determine whether Congress intended that a statute create an implied private right of action, which is the inquiry the Supreme Court undertook in *Sandoval*. *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 508 n.9, 110 L. Ed. 2d 455, 110 S. Ct. 2510 (1990). To discern whether an implied right of action exists under a particular statute, courts employ the four-factor test articulated by the Supreme Court in *Cort v. Ash*, 422 U.S. 66, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975). In *Cannon v. Univ. of Chicago*, 441 U.S. 677, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979), the Court explained:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," that is, does that statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purpose of the legislative scheme to imply such a remedy for

> the plaintiffs? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cannon, 441 U.S. at 689 n.9 (citations omitted). The Cort test "reflects a concern, grounded in separation of powers, that Congress rather than the courts control the availability of remedies for violations of statutes." *Wilder*, 496 U.S. at 509 n.9. While the Cort test, like the Blessing test, considers whether the provision was enacted for the benefit of the putative plaintiff, the central inquiry of the Cort test is the second prong of that test, specifically, "whether Congress intended to create, either expressly or by implication, a private cause of action." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575, 61 L. Ed. 2d 82, 99 S. Ct. 2479 (1979); accord *Suter v. Artist M*, 503 U.S. 347, 363, 118 L. Ed. 2d 1, 112 S. Ct. 1360 (stating that the Cort decision places the burden on the plaintiff to demonstrate Congress's intent to make a private remedy available); *Nat'l Sea Clammers Assoc.*, 453 U.S. at 11-13 (stating that the "key to the inquiry" is whether Congress intended to create a private right of action); *Transamerica Mortgage Advisors Inc., v. Lewis*, 444 U.S. 11, 15-16, 62 L. Ed. 2d 146, 100 S. Ct. 242 (1979) (describing that "what must ultimately be determined is whether Congress intended to create the private remedy asserted . . . .").

In contrast, the three-part inquiry described in *Blessing, supra,* utilized to determine whether a plaintiff may assert a claim for the same rights under §1983, is concerned with whether the statute creates a federal right in favor of the

plaintiff. Whether the statute provides a remedy is of less concern because §1983 itself provides the remedy. As the Supreme Court explained in Wilder:

> [The §1983 inquiry] turns on whether the provision in question was intended to benefit the putative plaintiffs. If so, the provision creates an enforceable right unless it reflects merely a congressional preference for a certain kind of conduct rather than a binding obligation on the governmental unit, or unless the interest the plaintiff asserts is too vague and amorphous such that it is beyond the competence of the judiciary to enforce.

Wilder, 496 U.S. at 509 (citations and internal quotations omitted). Section 1983 explicitly authorizes a private right of action, thereby obviating the need, in cases brought under §1983, for courts to scrutinize the underlying statute giving rise to the claim to determine whether plaintiffs have a private right of action under that statute itself. The Supreme Court has explained the rationale for the distinction between these two types of inquiries as follows:

> In implied right of action cases, we employ the four factor Cort test to determine 'whether Congress intended to create the private remedy asserted' for the violation of statutory rights. The test reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes. Because §1983 provides an "alternative source of

> express congressional authorization of private suits," these separation-of-powers concerns are not present in a §1983 case. Consistent with this view, we recognize an exception to the general rule that §1983 provides a remedy for violation of federal statutory rights only when Congress has affirmatively withdrawn the remedy.

Wilder, 496 U.S. at 508 n.9 (citations omitted).

The Third Circuit explained the difference between the two types of analysis as follows:

> For the sake of clarity, we briefly explain the difference between a §1983 private right of action analysis and the general implied right of action analysis of Cort v. Ash. When a statute does not explicitly supply a private right of action, two occasionally intersecting avenues may be explored for a possible private right of enforcement . . . under Cort v. Ash, the plaintiff bears the burden of establishing not only the existence of a right, but also the existence of an implied private remedy . . . . The §1983 analysis intersects with the Cort v. Ash analysis insofar as the plaintiff under both analyses must establish the creation of a federal right. With respect to the existence of a remedy, however, the contrast between the two is stark. Under Cort v. Ash the plaintiff must establish that Congress intended the remedy. Under §1983 analysis, on the other

> hand, once a federal right is established, the existence of a remedy is presumed because §1983 itself provides the authorization for private enforcement. The burden is on the defendant to foreclose private enforcement.

West Va. Univ. Hosp. v. Casey, 885 F.2d at 18 n.1. Other courts which have considered this issue have reached similar conclusions. For example, in *Samuels v. District of Columbia*, 248 U.S. App. D.C. 128, 770 F.2d 184 (D.C. Cir. 1985), the District of Columbia Court of Appeals explained:

> The *Thiboutot* decision thus allows private parties to enforce federal laws against a special class of defendants--state and municipal actors--in much the same way that implied rights of action permit private enforcement of federal statutory obligations against any party, public or private. As courts have recognized, however, statutory section 1983 claims differ significantly from implied private rights of action. In order to establish an implied private right of action under a federal statute, a plaintiff bears a relatively heavy burden of demonstrating that Congress affirmatively or specifically contemplated private enforcement when it passed the relevant statute. *See, e.g. Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 377-78, 72 L. Ed. 2d 182, 102 S. Ct. 1825, (1982); *Cannon v. University of Chicago*, 441 U.S. 677, 688, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979); *Cort v.*

> *Ash* 422 U.S. 66, 78, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975). Section 1983, however, itself creates an *express* federal cause of action against state officials for violations of federal law, and section 1983 plaintiffs do not suffer the burden of demonstrating that Congress specifically intended to preserve the ability of private parties to enforce the relevant provisions of federal law against those officials. *See Middlesex County Sewage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 21 n. 31, 69 L. Ed. 2d 435, 101 S. Ct. 2615, (1981) ("We do not suggest that the burden is on a plaintiff to demonstrate congressional intent to preserve §1983 remedies."). Instead, Congress is, in effect, presumed to legislate against the background of section 1983 and thus to contemplate private enforcement of the relevant statute against state and municipal actors absent fairly discernible congressional intent to the contrary. *See, e.g., Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm.*, 739 F.2d 1467, 1470-71 (9th Cir.1984).

Samuels, 770 F.2d at 194; *see also Dumas v. Kipp*, 90 F.3d 386, 391 (9th Cir. 1996) (observing that though there is a connection between the Cort test and the §1983 test, they are distinct). As I have already noted, the Supreme Court's holding in *Sandoval* is limited to its determination that §602 does not provide a private right of action to enforce the disparate impact regulations promulgated under §602. For the purposes of the majority Opinion, however, Justice Scalia

assumed the validity the regulations. *See Sandoval*, 532 U.S. 275, 149 L. Ed. 2d 517, 121 S. Ct. 1511, 2001 WL 408983 at *6-7.

The difference between these two lines of judicial inquiry explains why courts may find that a statute which does not contain an implied private right of action nonetheless creates rights which are enforceable through §1983. *See Santiago v. Muniz*, 53 F. Supp. 2d 264, 268 (E.D.N.Y. 1999) (explaining that "it is conceptually possible for a plaintiff who is the intended beneficiary of a statute to have a §1983 action but not a private right of action, or vice versa, because the remaining Blessing or Cort factors may not be satisfied in a plaintiff's favor.") For example, in *Fay v. South Colonie Cent. School District*, 802 F.2d 21, 33 (2d Cir. 1986), the Second Circuit held that although the Family Educational Rights and Privacy Act ("FERPA"), *20 U.S.C. §1232g*, itself does not give rise to a private cause of action, plaintiffs could nonetheless bring suit under §1983 to enforce rights created by FERPA.[5] Similarly, the Second Circuit held, in *Chan v.*

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[5] *See also, Tarka v. Cunningham*, 917 F.2d 890 (5th Cir. 1989), *cert. denied*, 494 U.S. 1080, 108 L. Ed. 2d 940, 110 S. Ct. 1809 (1990) (holding that "an action under *42 U.S.C. §1983* may nevertheless be premised on an alleged violation of FERPA rights"); *Achman v. Chisago Lakes Indep. Sch. Dist.*, 45 F. Supp. 2d 664, 674 (D. Minn. 1999) (holding that FERPA "creates a federal right that is enforceable through section 1983 actions"); *Maynard v. Greater Hoyt Sch. Dist.*, 876 F. Supp. 1104, 1107 (D.S.D. 1995) (stating that "FERPA does establish mandatory and direct obligations regarding educational records on school districts that receive federal funds"); *Belanger v. Nashua, New Hampshire, School Dist.*, 856 F. Supp. 40, 46 (D.N.H. 1994) (explaining that

City of New York, 1 F.3d 96 (2d Cir. 1993), based on the Cort analysis, that the Housing and Community Development Act did not create a private right of action, but did, based on the Blessing/Wilder analysis, create substantive rights which could be enforced through a §1983 action. *Chan*, 1 F.3d at 102-106. (holding that laborers under municipal contract did not have private right of action under statute and implementing regulations which mandated that public contractors pay laborers 'prevailing wages,' but did have right to such wages under the statute and could enforce this right through §1983). *See also Mallett v. Wisconsin Div. of Vocational Rehab.*, 130 F.3d 1245, 1248-57 (7th Cir. 1997) (determining that a plaintiff could bring §1983 claim based on the Rehabilitation Act because it created an enforceable right and did not foreclose such relief, but that there was no private right of action under the act because its language and legislative history suggested that the statute's administrative remedy was a more appropriate enforcement mechanism); *Keaukaha-Panaewa Comm. Ass'n v. Hawaiian Homes Comm'n*, 739 F.2d 1467, 1470-71 (9th Cir. 1984) (concluding that plaintiffs could bring §1983 action because the statute at issue clearly mandated that the trust at issue be established for benefit of Hawaiians such as plaintiffs and did not foreclose §1983 remedy, but also concluding that no private right of action existed under the statute); *Roman v.*

"the language of FERPA reveals a congressional intent to impose obligations directly on educational agencies or institutions"); *Krebs v. Rutgers*, 797 F. Supp. 1246, 1256 (D.N.J. 1992) (stating that FERPA creates civil rights enforceable under §§1983); *Francois v. University of District of Columbia*, 788 F. Supp. 31, 32 (D.D.C. 1992) (noting that FERPA "creates a federal right").

Morace, 1997 U.S. Dist. LEXIS 19926, No. 97- *CV-341, 1997 WL 777844,* at *3-13 (S.D.N.Y. Dec. 16, 1997) (determining that plaintiffs could bring a §1983 action as the intended beneficiaries of statutes, but could not sue directly under statutes).

D. Application of the § 1983 Analysis to this Case

1. The Plaintiffs' Claim: The EPA's Implementing Regulations Promulgated Under §602 Create a Federal Right to be Free of Adverse Disparate Impact Discrimination By Recipients of Federal Funds Pursuant to Title VI

Plaintiffs' §1983 claim is grounded on the premise that the EPA's implementing regulations, promulgated under §602, create a federal right to be free of adverse disparate impact discrimination by recipients of federal funds pursuant to Title VI. *See* Amd. Compl. at Second Count, PP 102-107. Because the existence of such a right turns on this Court's analysis of the regulations upon which Plaintiffs base their §1983 claim, I shall set forth the relevant portions of EPA's §602 implementing regulations in their entirety:

§7.30 General prohibition. No person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, national origin, or on the basis of sex in any program or activity receiving EPA assistance under the Federal Water Pollution Control Act, as amended, including the Environmental Financing Act of 1972.

§7.35 Specific prohibitions. (a) As to any program or activity receiving EPA assistance, a recipient shall not directly or through contractual, licensing, or other arrangements on the basis of race, color, national origin or, if applicable, sex:

(1) Deny a person any service, aid or other benefit of the program;

(2) Provide a person any service, aid or other benefit that is different, or is provided differently from that provided to others under the program;

(3) Restrict a person in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, aid, or benefit provided by the program;

(4) Subject a person to segregation in any manner or separate treatment in any way related to receiving services or benefits under the program;

(5) Deny a person or any group of persons the opportunity to participate as members of any planning or advisory body which is an integral part of the program, such as a local sanitation board or sewer authority;

(6) Discriminate in employment on the basis of sex in any program subject to Section 13, or on the basis of race, color, or national origin in any program whose purpose is to create employment; or, by means of employment discrimination, deny intended beneficiaries the benefits of the EPA assistance program, or subject the beneficiaries to prohibited discrimination.

(7) In administering a program or activity receiving Federal financial assistance in which the recipient has previously discriminated on the basis of race, color, sex, or national origin, the recipient shall take affirmative action to provide remedies to those who have been injured by the discrimination.

(b) A recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex.

(3) A recipient shall not choose a site or location of a facility that has the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program to which this Part applies on the grounds of race, color, or national origin or sex; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of this subpart.

(4) The specific prohibitions of discrimination enumerated above do not limit the general prohibition of §§7.30.

2. The Elements of a §1983 Claim

To pursue a §1983 suit alleging disparate impact discrimination in violation of the EPA's §602 implementing regulations, Plaintiffs must first demonstrate, as a threshold matter, that their claim falls within the ambit of §1983.

Section 1983 limits liability to any person who, under color of state law, subjects any citizen of the United States to a deprivation of any rights, privileges, or immunities secured by the Constitution and laws. 42 U.S.C. §1983.

Plaintiffs contend that Defendant, NJDEP Commissioner Robert Shinn, is a "person" within the meaning of §1983 such that Plaintiffs have the right to bring suit against him under §1983. In *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989), the Supreme Court held that "neither a State nor its officials acting in their official capacities are 'persons' under §1983," and that therefore, such defendants are immune from suit under §1983. *Will*, 491 U.S. at 71. While this holding appears at first blush to be fatal to Plaintiffs' case, the Supreme Court recognized an exception to its holding in Will: "Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under §1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Id.* at 71 n.10 (citing, inter alia, *Ex Parte Young*, 209 U.S. 123, 159-60, 52 L. Ed. 714, 28 S. Ct. 441 (1908)). Citing Will, the Third Circuit has explained this distinction as follows:

When state officials are sued in their official capacities for damages, that suit is treated as one against the state and the official is not considered to be a "person." Hence, §1983 cannot be invoked . . . . A suit for damages must be contrasted with a suit for equitable relief. The Supreme Court has held that a state official sued for injunctive relief is a "person" under §1983, because an action for prospective relief is not treated as an action against the state.

Powell, 189 F.3d at 401. Under the Supreme Court's holding in Will, it is clear that Plaintiffs' claim against Commissioner Shinn, for prospective injunctive relief, falls within the ambit of §1983.[6]

Second, §1983 is limited to claims alleging the deprivation, under color of state law, of "any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. §1983. Plaintiffs may only bring suit under §1983 to enforce rights secured by the Constitution "and laws." In this case, Plaintiffs base their §1983 claim now before this Court not on an alleged violation of the Constitution, but on the alleged violation of EPA's implementing regulations promulgated pursuant to Title VI, §602.

The Supreme Court has held that the plain meaning of the phrase "and laws" in §1983 authorizes plaintiffs to bring §1983 claims based on alleged violations of federal statutes. *Maine v. Thiboutot*, 448 U.S. 1, 4, 65 L. Ed. 2d 555, 100 S. Ct. 2502 (1980). The Court has, however, limited the

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[6] SLC argues that Plaintiffs cannot obtain the relief they seek, which SLC defines as the "retroactive revocation" of the permits NJDEP issued to SLC on October 31, 2000, under §1983, because "under the doctrine of Ex Parte Young, if a plaintiff sues a state official alleging a violation of federal law, the federal court may award an injunction that governs the official's future conduct; but the Eleventh Amendment bars retrospective relief." SLC Suppl. Br. at 35 (citations omitted). I shall consider SLC's argument regarding the relief available to plaintiffs under §1983 after I determine whether plaintiffs have demonstrated the existence of a federal right under the Blessing analysis.

prospective reach of its holding in Thiboutot by emphasizing, in subsequent decisions construing that case, that §1983 may only be invoked to assert a violation of a federal right, not merely a violation of federal law. *See Golden State Transit Corp.*, 493 U.S. at 106; *Blessing*, 520 U.S. at 340. The Court developed the analysis articulated in Blessing, infra, as a means of distinguishing those statutes which create rights within the meaning of §1983 from those which merely provide guidance or state policy preferences.

In this case, Plaintiffs contend that the EPA's implementing regulations, promulgated pursuant to §602 of Title VI, create "rights," within the meaning of §1983. As a threshold question, before I can address whether Plaintiffs are correct in their assertion that these particular regulations create such "rights," I must first consider Plaintiffs' contention, that, as a general proposition, agency regulations may create "rights" within the meaning of §1983. *See* Pls.' Suppl. Br. at 3.

The Supreme Court has answered this question in the affirmative. In *Wright v. City of Roanoke*, 479 U.S. 418, 93 L. Ed. 2d 781, 107 S. Ct. 766 (1987), the Court considered whether tenants living in low-income housing units could bring a §1983 action against the City of Roanoke Redevelopment and Housing Authority, based on their allegation that the defendant, by over-billing them, had violated the Brooke Amendment to the Housing Act of 1937 and implementing regulations promulgated by the Department of Housing and Urban Development ("HUD"). *Wright*, 479 U.S. at 419. The Brooke Amendment imposed a ceiling for rents charged to low-income tenants living in public housing projects. *See* 42 U.S.C. §1437a. HUD regulations

promulgated pursuant to the Brooke Amendment provided that the rent to be charged to tenants in public housing would include a "reasonable amount" for the use of utilities, such that the aggregate total paid by a family would not exceed one-fourth (subsequently raised to 30%) of that family's income. *See* Interim Rule, 45 Fed. Reg. 59502 (September 9, 1980); *24 C.F.R. §865.470* et seq. Plaintiffs alleged that the City Housing Authority had overcharged them for utilities because it failed to comply with HUD regulations, which entitled plaintiffs to the inclusion of "reasonable" utility services within their prescribed maximum rental payment. *Wright*, 479 U.S. at 423. In response, the Roanoke Housing Authority "asserted that neither the Brooke Amendment nor the HUD interim regulations gave tenants any specific or definable rights to utilities, that is, no enforceable rights within the meaning of §1983." *Id.* at 429.

The Supreme Court rejected the Housing Authority's argument based, in part, on its conclusion that the HUD regulations, promulgated to enforce the Brooke Amendment, created a right, enforceable via §1983, to have a reasonable amount of utilities included in rent that the public housing authority was authorized to charge. *Id.* at 430. The Court held that "HUD's view is entitled to deference as a valid interpretation of the statute, and Congress in the course of amending that provision has not disagreed with it." *Id; see also id.* at 427 (stating that "HUD's opinion as to the available tenant remedies under the Housing Act is entitled to some deference by this Court," and citing *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)).

The Court concluded that the intent of the Brooke Amendment to benefit plaintiffs was "undeniable," and that the HUD regulations interpreting that Amendment set out specific guidelines had "the force of law." 479 U.S. at 431 (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 294-95, 60 L. Ed. 2d 208, 99 S. Ct. 1705 (1979)). Furthermore, the Court held that the regulations created rights enforceable under §1983 because they conferred benefits on tenants, which were "sufficiently specific to qualify as enforceable rights under Pennhurst and §1983," and were not beyond the competence of the judiciary to enforce. *Wright*, 479 U.S. at 432. This is the exact test which the Supreme Court, citing Wright, recently applied in Blessing to determine whether a statute creates enforceable rights under §1983. *See Blessing*, 520 U.S. at 341.

The Third Circuit, applying Wright, has held that "with respect to the private rights requirement [of §1983 analysis], valid federal regulations as well as federal statutes may create rights enforceable under §1983." *West Va. Univ. Hosp. v. Casey*, 885 F.2d at 18. In that case, the Third Circuit held that a hospital located six miles from the Pennsylvania border, in West Virginia, could pursue a § 1983 action against Pennsylvania officials charged with administering Pennsylvania's Medicaid program, alleging that their refusal to reimburse the hospital for the costs of treating Pennsylvania Medicaid recipients violated Title XIX of the Social Security Act and regulations promulgated thereunder. *Id.* at 22-25. Similarly, in *Alexander v. Polk*, 750 F.2d 250 (3d Cir. 1984), the Third Circuit held that federal regulations governing the administration of the federal Supplemental Food Program for Women, Infants, and Children ("WIC")

program created rights enforceable under §1983 for recipients of WIC assistance.

Other Courts of Appeal have likewise concluded that federal regulations can form the basis for a §1983 action. *See, e.g., Loschiavo v. City of Dearborn*, 33 F.3d 548, 551 (6th Cir. 1994)(holding that regulation promulgated by Federal Communications Commission created right which plaintiff could enforce via §1983 suit against the City of Dearborn); *Buckley v. City of Redding, California,* 66 F.3d 188, 190 (9th Cir. 1995)(holding that regulations promulgated pursuant to Federal Aid in Sport Fish Restoration Act created right for the purpose of §1983).

The fact that federal regulations may have the force of law has been confirmed by the Supreme Court in other contexts. In *Chrysler Corp. v. Brown*, 441 U.S. 281, 60 L. Ed. 2d 208, 99 S. Ct. 1705 (1979), the Supreme Court held that regulations have the "force and effect of law" if they: (1) are substantive, meaning they function as a "legislative-type rule" which affects individual rights and obligations; (2) Congress granted the agency which issued the regulations the authority to promulgate such regulations; (3) the regulations were promulgated in accordance with any procedural requirements imposed by Congress, e.g., the Administrative Procedure Act. *Chrysler*, 441 U.S. at 301-03. The Chrysler test is regularly applied by federal courts to determine whether a particular regulation has the "force and effect of law." *See, e.g., Dunlap v. New Holland Sales Stables, Inc.*, 800 F.2d 1232, 1238 (3d Cir. 1986) (applying Chrysler to determine whether Farmers Home Administration regulation had "force or effect" of law); *U.S. v. Mitchell*, 39 F.3d 465 (4th Cir. 1994) (applying Chrysler to determine whether

Customs Service, United States Fish and Wildlife Department, and Department of Agriculture regulations had "force and effect of law"); *Brown v. United States*, 227 F.3d 295, 298 (5th Cir. 2000) (applying Chrysler to determine whether EEOC regulation had "force and effect of law"); *Morgan v. Markerdowne Corp.*, 976 F. Supp. 301, 313 (D.N.J. 1997) (Debevoise, J.)(applying Chrysler to determine that regulations promulgated by the Department of Education, pursuant to Higher Education Act of 1965, provided legally enforceable basis for student borrower to assert school-related defenses against lenders and assignees as to school-originated loans).

The Chrysler inquiry has been used in the context of determining whether regulations may create rights which are enforceable under §1983. For example, the Supreme Court cited Chrysler to support its conclusion, in Wright, that the HUD regulations at issue in that case created a "right" within the context of §1983. *Wright*, 479 U.S. at 431. Similarly, in *Samuels v. District of Columbia*, 248 U.S. App. D.C. 128, 770 F.2d 184 (D.C. Cir. 1985), the District of Columbia Court of Appeals found that plaintiffs' allegations, that the District of Columbia public housing authority had violated the Department of Housing and Urban Development's ("HUD") implementing regulations to the Housing Act, by failing to provide a grievance proceeding as mandated by regulations, alone stated a cognizable §1983 claim. 770 F.2d at 199 (citing 24 C.F.R. §§966.51(a), 966.53 and 42 U.S.C. §1437 et seq.). As the District of Columbia Court of Appeals explained:

> HUD's grievance procedure regulations clearly have the full force and effect of law:

> they are issued under a congressional directive to implement specific statutory norms and they affect individual rights and obligations. While *Thiboutot* involved a statutory violation, the Court's broad analysis of the 'laws' clause of section 1983 indicates that section 1983 provides a legal remedy for the violation of all valid federal laws, including at least those federal regulations adopted pursuant to a clear congressional mandate that have the full force and effect of law. Such regulations have long been recognized as part of the body of federal law, and *Thiboutot* expressly held that Congress did not intended to limit section 1983 to some subset of federal laws.

Samuels, 770 F.2d at 199. *See also DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 724 n.19 (10th Cir. 1988) (stating that "in at least some instances, violations of rights provided under federal regulations provide a basis for §1983 suits." (citations omitted)).

Applying the Chrysler inquiry to the regulations at issue in this case, I conclude that the EPA's §602 regulations satisfy the Chrysler criteria, and therefore have the "force and effect of law." The regulations, insofar as they explicitly prohibit recipients of federal funding from using "criteria or methods of administering [their] programs which have the effect" of subjecting individuals to discrimination, create obligations which directly affect individuals. 40 C.F.R. §7.35 (b). Furthermore, Congress granted the agency which issued the regulations not merely the authority to promulgate such regulations, but a directive to do so, in the plain language of

§602:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability . . . .

42 U.S.C. §2000d-1 (emphasis added). It is undisputed that the implementing regulations were promulgated in accordance with all procedural requirements imposed by Congress. Finally, I note again that, in the *Sandoval* decision, the Court assumed the validity of identical regulations promulgated by the Department of Justice and the Department of Transportation. *Sandoval*, 532 U.S. 275, 149 L. Ed. 2d 517, 121 S. Ct. 1511, 2001 WL 408983 at *4 (stating that "we therefore assume for the purposes of deciding this case that the DOJ and DOT regulations proscribing activities that have a disparate impact on the basis of race are valid.")

Thus, I conclude, based upon the Supreme Court's holding in Wright, as well as the holdings of the District of Columbia Circuit in Samuels, the Sixth Circuit in Loshchavio and the Ninth Circuit in Buckley, governing Third Circuit precedent, specifically, Alexander v. Polk and W. Va. Univ. Hosp., and my application of the Chrysler test, that valid federal regulations, which have the "force and effect of law,"

may create rights which are enforceable under §1983. *See Wright*, 479 U.S. at 430-32; *Loschiavo*, 33 F.3d at 550-53; *Buckley*, 66 F.3d at 190; *Alexander v. Polk*, 750 F.2d at 259-60; *W. Va. Univ. Hosp.*, 885 F.2d at 18. I further conclude that the appropriate test for discerning whether a federal regulation does in fact create a "right" within the meaning of §1983 is through the application of the three-part test first articulated in Wright and most recently reaffirmed by the Supreme Court in Blessing. *See Wright*, 479 U.S. at 430-32; *Blessing*, 520 U.S. at 340. Accordingly, I shall proceed to analyze Plaintiffs' claim by applying the three-part Blessing test.

3. A History of the Implementing Regulations Promulgated by Federal Agencies Pursuant to §602 of Title VI

The inquiry I must now undertake is whether the EPA's Title VI implementing regulations, codified at 40 C.F.R. §7.1 et seq., create rights enforceable under §1983. As I have explained, the Supreme Court articulated a three-part test, first in Wright, which it refined in Wilder, and most recently restated in Blessing, for determining whether a particular statutory or regulatory provision creates a "right" which is enforceable under §1983. This Court must decide whether the EPA's implementing regulations were intended to benefit the putative plaintiff, whether the right allegedly created is enforceable by the judiciary, and whether the provision allegedly creating the right is couched in mandatory or merely precatory terms.

To the extent that the EPA's implementing regulations to Title VI do not exist in isolation, but rather, were enacted

as part of a comprehensive multi-agency response to Congress's directive, expressed in §602, requiring federal agencies to effectuate the anti-discrimination mandate of §601, I shall first consider the questions raised in the Blessing test in the context of the effort by federal agencies to implement Title VI pursuant to §602.

Title VI was enacted as part of the comprehensive Civil Rights Act of 1964. The other subchapters of the Civil Rights Act prohibit discrimination in Public Accommodation (Title II, 42 U.S.C. §2000a et seq.), Public Facilities (Title III, 42 U.S.C. §2000b et seq.), Public Education (Title IV, 42 U.S.C. §2000c et seq.), and Employment (Title VII, 42 U.S.C. §2000e et seq.)

It is axiomatic that Congress's purpose in enacting the Civil Rights Act of 1964 was to prohibit discrimination against individuals on the basis of race, color, or national origin. The specific purpose of Title VI was explained as follows by Representative Cellar, the Chairman of the House Judiciary Committee, when he introduced Title VI:

> Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination. Direct discrimination by Federal, State, or local governments is prohibited by the Constitution. But indirect discrimination, through the use of federal funds, is just as invidious.

109 Cong. Rec. 11161 (1963). After reviewing the legislative history of Title VI, Justice Brennan, writing for a plurality of the Supreme Court which concurred in the judgment in *Regents of Univ. California v. Bakke*, 438 U.S. 265, 335, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting) explained that "the conclusion to be drawn from the [legislative history of Title VI] is clear. Congress recognized that Negroes, in some cases with Congressional acquiescence, were being discriminated against in the administration of programs and denied the full benefits of activities receiving federal financial support," and enacted Title VI to give the Executive Branch the authority to end the Government's complicity in this discrimination. *Bakke*, 438 U.S. at 335.

Significantly, Congress, in enacting Title VI, did not define "discrimination," nor does §602 contain an explanation of what constitutes "discrimination." Rather, as Justice Brennan explained, "the legislative history shows that Congress specifically eschewed any static definition of discrimination in favor of broad language that could be shaped by experience, administrative necessity, and evolving judicial doctrine." *Bakke*, 438 U.S. at 337.[7] For example, Attorney

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[7] *See also* Guardians, where Justice Marshall explained:

The legislative history of Title VI fully confirms that Congress intended to delegate to the Executive Branch substantial leeway in interpreting the meaning of "discrimination" under Title VI. The word "discrimination" was nowhere defined in Title VI. Instead, Congress authorized executive departments and agencies to adopt regulations with the anti-discrimination principle of §§601

General Robert Kennedy testified that the regulations were not written into the legislation because "there are so many different programs . . . to try to write out something specifically in the legislation as to what should be done, and what rules and regulations would be issued is virtually impossible." Civil Rights: Hearings before Subcomm. No. 5 of the House Comm. on the Judiciary, 88th Cong., 1st Sess. 2703 (testimony of Atty. Gen. Kennedy).

Congress chose to delegate this duty to the federal agencies. Justice Marshall, in reviewing the legislative history of Title VI in Guardians, explained the intent of Congress and the evolution of Title VI and the §602 implementing regulations as follows:

> Shortly after the enactment of Title VI, a presidential task force produced model Title VI enforcement regulations specifying that recipients of federal funds not use "criteria or methods of administration which have the effect of subjecting individuals to discrimination." 45 C.F.R. §§80.3(b)(2) (1964). The Justice Department, which had

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of the Act "as a general criterion to follow." Civil Rights: Hearings on H.R. 7152 Before the House Comm. on the Judiciary, 88th Cong., 1st Sess. 2740 (1963) (testimony of Attorney General Kennedy). Congress willingly conceded "great powers" to the executive branch in defining the reach of the statute. *Id.*, at 1520 (statement of Rep. Cellar, Chairman of the House Judiciary Committee).

463 U.S. at 622-23 (Marshall, J. dissenting).

> helped draft the language of Title VI, participated heavily in preparing the regulations. Seven federal agencies and departments carrying out the mandate of Title VI soon promulgated regulations that applied a disparate impact or "effects" test. *See* 29 Fed. Reg. 16274-16305 (1964).
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> * * * *
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> Following the initial promulgation of regulations adopting an impact standard, every Cabinet department and about forty federal agencies adopted standards interpreting Title VI to bar programs with a discriminatory impact. The statute has been uniformly and consistently so construed by the agencies responsible for its enforcement for nearly two decades.

Guardians, 463 U.S. at 618 (Marshall, J., dissenting). In sum, federal agencies, acting pursuant to Congress's mandate, explicit in the language of §602, that "each federal agency is . . . authorized and directed to" promulgate regulations, have uniformly promulgated regulations which prohibit disparate impact discrimination.[8]

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[8] *See, e.g.*:

5 C.F.R. §§900.404(b)(2) (Office of Personnel Management);
7 C.F.R. §§15.3(b)(2) (Dep't of Agric.);
7 C.F.R. §§1901.202(a)(2)(vii) (Dep't of Agric.);
10 C.F.R. §§4.12(b) (Nuclear Regulatory Comm'n);

The overwhelmingly uniform and consistent response of federal agencies to Title VI supports the conclusion that both sections of Title VI impose affirmative duties on federal agencies and funding recipients. Section 601, which provides that "no person shall" be discriminated against in the provision of federally-funded services, expresses a Congressional mandate, not merely a "preference" or policy guidance. Section 602 "authorizes and directs" each federal agency to implement the mandate contained in Section 601.

Finally, Congress, although it has amended the Civil Rights Act numerous times since its original enactment in 1964, has never acted to correct, reverse, or otherwise change this consistent interpretation of Congress's intent in enacting §602. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82, 72 L. Ed. 2d 182, 102 S. Ct.

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10 C.F.R. §§1040.13(c), (d) (Dep't of Energy);
14 C.F.R. §§1250.103- 2(b) (NASA);
15 C.F.R. §§8.4(b)(viii)(2) (Dep't of Commerce);
18 C.F.R. §§705.4(b)(2) (Water Resources Council);
18 C.F.R. §§1302.4(b)(2), (3) (Tenn. Valley Auth.);
22 C.F.R. §§141.3(b)(2) (State Dep't);
22 C.F.R. §§209.4(b)(2), (3) (Agency for Int'l Dev.);
24 C.F.R. §§1.4(b)(2), (i)(3)) (Dep't of Housing & Urban Dev.);
28 C.F.R. §§42.104. (b)(2), (3) (Justice Dep't);
29 C.F.R. §§31.3(b)(2), (3) (Dep't of Labor);
32 C.F.R. §§195.4(b)(2) (Dep't of Defense);
34 C.F.R. §§100.3(b)(2)(Dep't of Education)
38 C.F.R. §§18.3(b)(2) (Dep't of Veterans Affairs);
45 C.F.R. §§80.3(b)(2) (Dep't of Health & Human Servs.);
45 C.F.R. §§611.3(b)(2) (Nat'l Science Found.);
45 C.F.R. §§1203.4(b)(2)(Corp. for Nat'l & Community Serv.);
49 C.F.R. §§21.5(b)(2) (Dep't of Transportation).

1825 (1982) (Court inferred congressional intent to ratify lower court decisions regarding a particular statutory provision when Congress revised a statutory scheme without amending the provision in question).[9]

In contrast to the uniform interpretation of Title VI by federal agencies, the Supreme Court's Title VI jurisprudence has been described as "fractured." *Sandoval*, 532 U.S. 275, 149 L. Ed. 2d 517, 121 S. Ct. 1511, 2001 U.S. LEXIS 3367, 2001 WL 408983 at *13 (Stevens, J., dissenting). Indeed, as Justice Scalia stated in *Sandoval*, "although Title VI has often come to this Court, it is fair to say (indeed, perhaps an understatement) that our opinions have not eliminated all uncertainty regarding its commands." *Sandoval*, 532 U.S. 275, 149 L. Ed. 2d 517, 121 S. Ct. 1511, 2001 WL 408983 at *4. Nevertheless, a close examination of Supreme Court precedent analyzing Title VI reveals the Court's unvarying assumption, expressed most recently in *Sandoval*, that the implementing regulations promulgated pursuant to §602 are valid.

An examination of the Title VI implementing regulations necessarily begins with the Supreme Court's opinion in Guardians. Guardians involved a suit brought by African-American and Hispanic police officers against the

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[9] But cf. *Sandoval*, 532 U.S. 275, 149 L. Ed. 2d 517, 121 S. Ct. 1511, 2001 WL 408983 at *10 (stating that the fact that Congress has not acted to reverse the numerous courts which had construed Title VI as providing an implied private right of action did not indicate Congressional "ratification" of that interpretation because Congress has made only "isolated" amendments to Title VI.)

City of New York, alleging that the City's practice of "last-hired, first-fired" violated Title VI. No opinion in that case commanded a majority. Five Justices, however, held that disparate impact regulations adopted by federal agencies under §602 were valid interpretations of Title VI. *Guardians*, 463 U.S. at 593 (White, J. concurring); *id.* at 623 (Marshall; J. dissenting); and *id.* at 644-45 (Stevens, Brennan, and Blackmun, JJ., dissenting).

This understanding of Guardians was corroborated by a unanimous Supreme Court in Alexandar v. Choate, decided just a year and a half after Guardians:

In Guardians, we confronted the question whether Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d et seq., which prohibits discrimination against racial and ethnic minorities in programs receiving federal aid, reaches both intentional and disparate-impact discrimination. No opinion commanded a majority in Guardians, and Members of the Court offered widely varying interpretations of Title VI. Nevertheless, a two-pronged holding on the nature of discrimination proscribed by Title VI emerged in that case. First, the Court held that Title VI itself reached only instances of intentional discrimination. Second, the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI. In essence, then, we held that Title VI had delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts.

Alexander v. Choate, 469 U.S. 287, 293-94, 83 L. Ed. 2d 661, 105 S. Ct. 712 (1985) (emphasis added).

Relying on the Supreme Court's affirmation, in Alexander v. Choate, of the five Justice coalition's holding in Guardians, that federal agencies may validly prohibit disparate impact discrimination pursuant to Title VI, many federal courts have assumed the validity of Title VI implementing regulations prohibiting disparate impact discrimination, and applied them in litigation involving a vast range of federally-funded activity. *See, e.g., Powell*, 189 F.3d at 396-400 (In action brought by minorities alleging that state's practices in funding public education had racially discriminatory effect, in violation of Department of Education's Title VI implementing regulations, 34 C.F.R. §100.3(b)(2), the Third Circuit cited Guardians and applied disparate impact analysis based on regulations); *Latinos Unidos de Chelsea en Accion (LUCHA) v. HUD*, 799 F.2d 774 (1st Cir. 1986) (In action brought by minorities alleging that defendants deprived minorities of equal opportunity in employment, housing and government contracts, in violation of Department of Housing's Title VI implementing regulations, 24 C.F.R. §1.4(b)(2)(i), the First Circuit applied disparate impact analysis based on regulations); *New York Urban League v. State of New York*, 71 F.3d 1031, 1036 (2d Cir. 1995) (In action brought by mass-transit users against the State of New York, alleging that state's allocation of funds for mass transit discriminated against minority users in violation of Department of Transportation's Title VI implementing regulations, 49 C.F.R. §21.5(b)(2), the Second Circuit cited Guardians and Alexander v. Choate to support the proposition that Title VI delegated to federal agencies the authority to promulgate regulations incorporating a disparate impact

standard); *Ferguson v. Charleston*, 186 F.3d 469 (4th Cir. 1999), rev'd on other grounds, 532 U.S. 67, 149 L. Ed. 2d 205, 121 S. Ct. 1281 (2001) (In action brought by minority health' services recipients, alleging that hospital's policy of testing pregnant women for cocaine disparately impacted African-American women in violation of Department of Health and Human Services' Title VI implementing regulations, 45 C.F.R. §§80.3(b)(2), the Fourth Circuit cited Guardians and Alexander v. Choate and applied disparate impact analysis); *Castaneda v. Pickard*, 781 F.2d 456, 465 n.11 (5th Cir. 1986) (In action brought by Mexican-American children and their parents, alleging that school district had discriminated against them in violation of Title VI, the Fifth Circuit cited Guardians and noted that "the Supreme Court has [] held that proof of discriminatory intent is not required for a Title VI action for equitable relief . . . a Title VI action can now be maintained in either the guise of a disparate treatment case, where proof of discriminatory motive is crucial, or in the guise of a disparate impact case, involving employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another. In this latter type of case, proof of discriminatory intent is not necessary."); *Buchanan v. Bolivar*, 99 F.3d 1352, 1356 n.5 (6th Cir. 1996) (stating that "[a] plaintiff may pursue [a Title VI] claim under a disparate impact theory as well," citing *Guardians*, 463 U.S. 582, 77 L. Ed. 2d 866, 103 S. Ct. 3221 (1983)). *David K. v. Lane*, 839 F.2d 1265, 1274 (7th Cir. 1988) (In action brought by white inmates against prison, alleging that prison policy of allowing gang activity had discriminatory impact in violation of Department of Justice's Title VI disparate impact regulations, 28 C.F.R. 42.104(b)(2), the Seventh Circuit cited Guardians to support the proposition that "plaintiffs need not

show intentional discriminatory conduct to prevail on a claim brought under these administrative regulations. Evidence of discriminatory effect is sufficient."); *City of Chicago v. Lindley*, 66 F.3d 819, 827-29 (7th Cir. 1995) (In action brought by City of Chicago against director of Department of Aging, alleging that funding distribution calculation had disparate impact on minorities in violation of Department of Health & Human Services Title VI implementing regulations, 45 C.F.R. §§80.3(b)(2), the Seventh Circuit applied disparate impact analysis based on Guardians and Alexander v. Choate); *Larry P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1984) (In class action brought by minority children, alleging school district's use of IQ tests to place certain students in class for the educable mentally retarded had disparate impact on minority children in violation of Department of Health, Education and Welfare Title VI implementing regulations, the Ninth Circuit cited Guardians and stated that "given appellees' reliance on the [Title VI implementing] regulations, we find it appropriate to apply a discriminatory effect analysis."); *Villanueva v. Carere*, 85 F.3d 481, 486 (10th Cir. 1996) (In action brought by Hispanic parents, alleging school district's decision to close neighborhood schools and open new charter school constituted disparate impact discrimination in violation of Title VI implementing regulations, the Tenth Circuit cited Guardians and stated that "although Title VI itself proscribes only intentional discrimination, certain regulations promulgated pursuant to Title VI prohibit actions that have a disparate impact on groups protected by the act, even in the absence of discriminatory intent.); *Elston v. Talladega Board of Educ.*, 997 F.2d 1394, 1406-07 (11th Cir. 1993) (In action brought by class of African-American children and their parents, alleging that school's effort to restructure school system had discriminatory impact on children in violation of

Department of Education's Title VI implementing regulations, the Eleventh Circuit applied disparate impact analysis and cited Guardians for the proposition that "while Title VI itself, like the Fourteenth Amendment, bars only intentional discrimination, the regulations promulgated pursuant to Title VI may validly proscribe actions having a disparate impact on groups protected by the statute, even if those actions are not intentionally discriminatory."); *Rodriguez v. California Highway Patrol*, 89 F. Supp. 2d 1131, 1139 (N.D. Cal. 2000) (In action brought by minority drivers pursuant to Department of Justice's Title VI implementing regulations, 28 C.F.R. 42.104(b)(2), alleging that California Highway Patrol engaged in discriminatory racial profiling, the Northern District of California stated that "[section 601] requires proof of discriminatory intent; the regulations do not," and held that plaintiffs had stated a claim under the regulations).

The cases cited above represent a small number of those cases in which federal courts have considered disparate impact claims based on alleged violations of Title VI implementing regulations in the nearly twenty years since the Supreme Court's decisions in Guardians and Alexander v. Choate. The frequency with which federal courts have had occasion to review such claims, and the proficiency with which they have done so, leads this Court to conclude that the right(s) created by Title VI implementing regulations are not so "vague and amorphous" as to be unenforceable, but rather, are clearly within the competence of the judiciary to enforce. *See Blessing*, 520 U.S. at 340-41.

Finally, I note that the Supreme Court's holdings, in Guardians and Alexander v. Choate, recognizing the validity of the Title VI implementing regulations prohibiting disparate

impact discrimination, and the uniform application of these regulations in federal courts in nearly every Federal Circuit, are consistent with the deference courts must accord to validly enacted administrative regulations. As this Court recently explained:

> When Congress expressly delegates to an administrative agency the authority to make specific policy determinations, courts must give the agency's decision controlling weight unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *ABF Freight System, Inc. v. National Labor Relations Board*, 510 U.S. 317, 324, 127 L. Ed. 2d 152, 114 S. Ct. 835 (1994) (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778, (1984)); accord *Yeskey v. Commonwealth of Pennsylvania Department of Corrections*, 118 F.3d 168, 170 (3d Cir.1997) [aff'd. 524 U.S. 206, 141 L. Ed. 2d 215, 118 S. Ct. 1952 (1998)]; *see also Environmental Defense Fund, Inc. v. Costle*, 205 U.S. App. D.C. 101, 636 F.2d 1229, 1257 (D.C. Cir. 1980) ("Deference to the agency's interpretation is particularly appropriate where, as here, the statute specifically requires the agency to develop implementing regulations").

Bryant v. New Jersey Dep't of Transp., 998 F. Supp. 438, 446 (D.N.J. 1998) (Orlofsky, J.). Bryant involved a suit brought by residents of a predominantly African-American neighborhood, alleging that the New Jersey Department of Transportation's decision to construct a highway and tunnel through their neighborhood violated the Department of Transportation's Title VI implementing regulations prohibiting the siting of facilities which have a disparate impact on individuals based on their race, color, or national

origin, 49 C.F.R. §§21.5(b)(3). Evaluating that claim, this Court concluded that "[the Department of Transportation's Title VI implementing regulation] is not arbitrary, capricious or manifestly contrary to Section 601." *Id.* at 446 (citation omitted). *See also, Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369, 36 L. Ed. 2d 318, 93 S. Ct. 1652 (explaining that "where the empowering provision of a statute states simply that the agency may 'make . . . such rules and regulations as may be necessary to carry out the provisions of this Act,' we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation."); *Williamson Shaft Contracting Co. v. Phillips*, 794 F.2d 865, 869 (3rd Cir. 1986) (same).

4. The Blessing Test: Whether the EPA's §602 Implementing Regulations Confer a Federal "Right" on Plaintiffs Enforceable Under §1983

a. Whether the Regulations Promulgated Under §602 Were Intended To Benefit Plaintiffs

Applying the three-part Blessing analysis to Plaintiffs' claim in this case, the first question this Court must address is whether the EPA's implementing regulations promulgated pursuant to §602, *see* 40 C.F.R. §7.10 et seq., were intended to benefit a class which includes the Plaintiffs. *See Blessing*, 520 U.S. at 340. This question is easily answered in the affirmative. Indeed, to paraphrase the Supreme Court, "there can be little doubt" that Title VI of the Civil Rights Act, and implementing regulations promulgated pursuant to §602 of the Act, were intended to benefit the class of persons to which

Plaintiffs belong, namely, persons of color. *See Wilder*, 496 U.S. at 510.

First, for the reasons I have already set forth above, the EPA's implementing regulations must be considered in the context of the broader legislative and regulatory initiative mandated by Congress through the Civil Rights Act in general, and Title VI in particular, of which the EPA's implementing regulations are but a small part. "[To determine] whether a statute creates a right, courts must look to the entire statute and its policy objective." *Elliot v. Chicago Housing Auth.*, 1999 U.S. Dist. LEXIS 11276, *21, No. 98-6307, 1999 WL 519200 (N.D.. Ill. July 14, 1999) (citing *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 18, 67 L. Ed. 2d 694, 101 S. Ct. 1531 (1981)). In enacting Title VI, Congress intended to benefit individuals who were subjected to discrimination. This legislative intent was succinctly articulated by Representative Lindsay:

Everything in this proposed legislation has to do with providing a body of law which will surround and protect the individual from some power complex. This bill is designed for the protection of individuals. When an individual is wronged he can invoke the protection to himself, but if he is unable to do so because of economic distress or because of fear then the Federal Government is authorized to invoke that individual protection for that individual . . . .

Cannon v. Univ. of Chicago, 441 U.S. at 704 n.36 (citing 110 Cong. Rec. 1540).

The Supreme Court has also summarized the intent of Congress when it enacted Title VI, as follows:

> Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices. Both of these purposes were repeatedly identified in the debates on the two statutes.

Cannon v. Univ. of Chicago, 441 U.S. at 704.

Of the ten individual plaintiffs in this case, seven are African-American and two are Hispanic. *SCCIA I*, 2001 WL 392472 at *3. The organizational plaintiff, South Camden Citizens In Action, draws its membership from a neighborhood, Waterfront South, which is 91% persons of color. *Id.* Plaintiffs in this case clearly belong to the class of persons Congress intended to benefit in Title VI by prohibiting programs and activities which receive federal funds from discriminating against persons based on their race, §601, and authorizing federal agencies to promulgate regulations to effectuate this prohibition, §602.

Second, the specific language of the EPA's implementing regulations clearly reveals an intent to benefit individuals such as the Plaintiffs. The regulations explicitly state: "no person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, [or] national origin." 40 C.F.R. §7.30 (emphasis added). This language is "mandatory and clear and therefore creates rights enforceable by individuals." *Marie O. v. Edgar*, 131 F.3d 610, 619 (7th Cir. 1997) (applying Blessing and holding that handicapped children had right to

"early intervention," based on the Individuals with Disabilities Act, 20 U.S.C. §§1471-1485, which was enforceable against the state by individuals under §1983); *see also Johnson v. Guhl*, 91 F. Supp. 2d 754, 768 (D.N.J. 1997) (Bassler, J.) (applying Blessing and holding that institutionalized persons had rights under provisions of the Medicaid Act based, in part, on conclusion that "[a] plain reading of [the Medicaid Act] evidences that it is intended to benefit needy individuals,"); *Evergreen Presbyterian Ministries v. Hood*, 235 F.3d 908, 927 (5th Cir. 2000) (applying Blessing and Wilder and holding that "[Medicaid] recipients are intended beneficiaries of [statute provision at issue] because the provision is 'phrased in terms' benefitting recipients").

In addition to this general prohibition, the EPA's Title VI implementing regulations specifically forbid recipients of federal funds from "using criteria or methods of administering [their] program[s] which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impacting the accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex." 40 C.F.R. §7.35(b) (emphasis added). The EPA's regulations, promulgated at the express instruction of Congress in §602, are "undoubtedly intended to benefit individuals such as the plaintiffs." *Reynolds v. Giuliani*, 35 F. Supp. 2d 331, 341 (S.D.N.Y. 1999) (applying Blessing and holding that qualified welfare beneficiaries have rights in the "timely, accurate, and fair" provision of food stamps under the Food Stamp Act of 1977, 7 U.S.C. §2011 and the Social Security Act, 42 U.S.C. §1396 et seq.)

I find SLC's argument, that neither §602 nor the EPA's implementing regulations were intended to benefit Plaintiffs, unpersuasive. SLC argues that "as a preliminary matter, Congress did not intend for Section 602 to benefit Plaintiffs." SLC Suppl. Br. at 25. SLC contends that both §602 and the EPA's implementing regulations are too broadly worded to invoke individual rights, that they create a "yardstick" for the "system-wide measurement" of services as opposed to an "individual entitlement," and are focused on funding recipients. To support this contention, SLC relies on the Supreme Court's decision in Blessing, in which the Court held that a particular provision of Title IV-D of the Social Security Act "does not give individual rights to force a state agency to substantially comply with Title IV-D." Blessing, 520 U.S. at 333. As the following analysis makes clear, however, Blessing is clearly distinguishable from this case on both the facts and the law.

Blessing involved a suit brought by five custodial mothers whose children were eligible to receive child support services from the State under Title IV-D. To qualify for federal Aid to Families With Dependent Children ("AFDC") funds, states must certify that they will operate child support enforcement programs that conform with the requirements of Title IV-D. These requirements place upon states the obligation to collect overdue support payments, establish a comprehensive system to establish paternity, locate absent parents, and help families obtain support orders. The state is required to provide these services free of charge to AFDC recipients, who must, in turn, assign their child support rights to the state. The state may then keep most of the support payments it collects to offset the costs of providing welfare benefits; however, it is required to distribute a portion of the

funds it collects to parents receiving AFDC, and all of the funds to parents who are not receiving AFDC. In Blessing, the plaintiffs alleged that the state was not in "substantial compliance" because its program was inadequately staffed, used outdated technology and suffered from other "structural defects." *Blessing*, 520 U.S. at 341-42.

Contrary to SLC's assertion, in Blessing the Supreme Court did not conclude that Title IV-D can never provide a basis for individual rights, but, rather, that plaintiffs in that case had failed to allege with adequate specificity the rights which they claimed were being violated, and instead, had merely alleged a violation of a general provision of the statute. The Supreme Court explained,

We do not foreclose the possibility that some provisions of Title IV-D give rise to individual rights . . . it is not at all apparent that [plaintiffs] sought any relief more specific than a declaration that their "rights" were being violated and an injunction forcing Arizona's child support agency to "substantially comply" with all of the provisions of Title IV-D. We think that this defect is best addressed by sending the case back to the District Court to construe the complaint in the first instance, in order to determine exactly what rights, considered in their most concrete, specific form, [plaintiffs] are asserting . . . . We leave open the possibility that Title IV-D may give rise to some individually enforceable rights.

Blessing, 520 U.S. at 346 (emphasis added). Cf. SLC Suppl. Br. at 25 (stating that "in Blessing v. Freestone, the Court determined that the plaintiffs had no private right under Section 1983 to enforce provisions of the Social Security

Act.") What the Supreme Court did conclude in Blessing is that the provision upon which the Blessing plaintiffs relied, which requires states to be in "substantial compliance" with Title IV-D, was intended as a "yardstick" for the Secretary of Health and Human Services Appeals to measure the "system-wide" performance of a state's Title IV-D program, and that without more specific findings regarding the rights allegedly violated, this provision was inadequate to support individually enforceable rights. *Blessing*, 520 U.S. at 343. Therefore, the Supreme Court held that the Ninth Circuit had erred in concluding that Title IV-D created rights enforceable which were under §1983 "without distinguishing among the numerous provisions of this complex program." *Blessing*, 520 U.S. at 333 (stating that "we disagree that the statutory scheme can be analyzed so generally"). According to the Supreme Court, the Ninth Circuit "did not engage in a methodical inquiry" as to the specific right(s) alleged, and instead took a "blanket approach" to determining whether Title IV-D creates rights. *Id.* at 343-44. The Court therefore remanded the case to the District Court.

In contrast to Blessing, Plaintiffs in this case have asserted a simple and specific right under the EPA's Title VI implementing regulations: to be free of disparate impact discrimination caused by the use, by a recipient of federal funds, of "criteria or methods" which have a discriminatory "effect" on individuals based on their race, color, or national origin. Plaintiffs assert that by undertaking an adverse disparate impact analysis prior to permitting the operation of polluting facilities, NJDEP would avoid such a discriminatory

"effect." *See* Amd. Compl. at PP 84-96; 40 C.F.R. §7.80.[10] Indeed, in accordance with the specific language of the regulations, as a condition of receiving federal funds, NJDEP had given its assurance that it will conduct a disparate impact analysis. Unlike the plaintiffs in Blessing, Plaintiffs in this case have not merely requested "substantial compliance" with a "general provision," but rather, have identified with precision both the regulatory provisions upon which they base their claim, 40 C.F.R. §7.35(b), and the compliance they seek, namely, the performance of an adverse disparate impact assessment and consideration of the cumulative environmental burdens and community-specific health problems, as part of the NJDEP's permitting process. Amd. Compl. at PP 84-96; 102-107. And unlike the defendant state agency in Blessing, which was at least attempting to comply with the obligations it had assumed as a condition of accepting federal funds, though the Blessing plaintiffs alleged its attempt was insufficient, the NJDEP in this case has flatly denied that it has any obligations whatsoever to Plaintiffs beyond ensuring that permitted facilities comply with environmental emissions standards. Yet, as I noted in *SCCIA I*, the EPA has explicitly

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[10] 40 C.F.R. §7.80 provides, in relevant part, as follows:

(a) Assurances

(1) General. Applicants for EPA assistance shall submit an assurance with their applications stating that, with respect to their programs or activities that receive EPA assistance, they will comply with the requirements of this Part. Applicants must also submit any other information that the OCR determines is necessary for preaward review. The applicant's acceptance of EPA assistance is an acceptance of the obligation of this assurance and this Part.

stated that "compliance with environmental laws does not constitute per se compliance with Title VI. . . . A recipient's Title VI obligation exists in addition to the Federal or state environmental laws governing its environmental permitting program. 65 Fed. Reg. 39650, 39680 (emphasis added). Also in *SCCIA I*, I noted that the NJDEP has, in numerous other fora, recognized its obligation to perform a disparate impact analysis, and in fact, notified SLC that such an analysis might be necessary prior to SLC's construction of the proposed facility.[11]

Following the Supreme Court's instruction in Blessing, I have undertaken a methodical analysis of the right asserted by Plaintiffs. Based on the Congressional intent in enacting Title VI, the Supreme Court's recognition that Title VI assigned to federal agencies the responsibility for promulgating regulations designed to implement the purposes of Title VI, and the plain language of the EPA's § 602 implementing regulations, as further clarified by the Guidances, I conclude that the Plaintiffs have satisfied the first part of the Blessing test, which requires them to demonstrate that they belong to the class of persons which the regulations were intended to benefit.

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[11] The NJDEP advised SLC, by letter dated September 2, 1999, well before SLC began construction, that "due to the fact that St. Lawrence will be operating in an economically depressed area which has a substantial minority population, the Department will evaluate the need to conduct a Environmental Justice analysis." Pomar Cert., Exh. B at B-2. As I noted in *SCCIA I*, "inexplicably, the NJDEP never undertook such an analysis, which is precisely what prompted Plaintiffs to file the present suit." *SCCIA I*, 2001 WL 392472 at *51 n.14.

2. Whether "the Right Assertedly Protected by the Provision is so 'Vague and Amorphous' that its Enforcement would Strain Judicial Competence"

The second part of the Blessing test requires an analysis of whether the right which Plaintiffs are asserting is "so vague and "amorphous" that its enforcement would strain judicial competence. *Blessing*, 520 U.S. at 341. There is no ambiguity in the EPA's Title VI implementing regulations; rather, they clearly state that: "No person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, national origin." 40 C.F.R. §7.30. Furthermore, the regulations specifically and unambiguously prohibit disparate impact discrimination. 40 C.F.R. §7.35(b)(stating that "[a] recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex.")

This Court need not speculate about judicial competence to enforce federal regulations prohibiting disparate impact discrimination, promulgated pursuant to Title VI, because a substantial body of case law already exists which demonstrates the capacity of the federal judiciary to perform exactly this analysis. *See, e.g., Powell v. Ridge*, 189 F.3d 387 (3d Cir. 1999), *cert. denied*, 528 U.S. 1046, 120 S. Ct. 579 (1999); *New York Urban League v. State of New York*, 71 F.3d 1031 (2d Cir. 1995); *Ferguson v. Charleston*,

186 F.3d 469 (4th Cir. 1999), rev'd on other grounds, 532 U.S. 67, 149 L. Ed. 2d 205, 121 S. Ct. 1281 (2001); *David K. v. Lane*, 839 F.2d 1265, 1274 (7th Cir. 1988); *City of Chicago v. Lindley*, 66 F.3d 819 (7th Cir. 1995); *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984); *Villanueva v. Carere*, 85 F.3d 481 (10th Cir. 1996); *Elston v. Talladega Board of Educ.*, 997 F.2d 1394 (11th Cir. 1993).[12] Indeed, as the foregoing cases demonstrate, federal courts have enforced rights created by Title VI disparate impact regulations in contexts as diverse as public education, *see, e.g., Powell*, 189 F.3d 387; housing, *see, e.g.*, 3004 *Albany Crescent Tenants' Assoc. v. City of New York*, 1997 U.S. Dist. LEXIS 6138, No. 95-10662, 1997 WL 225825 (S.D.N.Y. May 5, 1997); and transportation, *see, e.g., New York Urban League*, 71 F.3d 1031 Finally, the ability of federal courts to enforce the specific rights created by the EPA's Title VI implementing regulations, 40 C.F.R. §7.10, et. seq., has been demonstrated on at least two occasions. *See New York City Environmental Justice Alliance ("NYCEJA") v. Giuliani*, 214 F.3d 65 (2d Cir. 2000); *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997), *cert. granted*, 524 U.S. 915 (1998), decision vacated and certiorari dismissed as moot, 524 U.S. 974 (1998).

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[12] The fact that many of these decisions assumed the existence of a private right of action under §602, and have subsequently been overruled by *Sandoval* on that point, is irrelevant to their precedential value in demonstrating the ability of courts to apply and enforce disparate impact regulations promulgated to implement Title VI, the validity of which are unaffected by *Sandoval* as specifically noted in Justice Scalia's majority Opinion.

The fact that the Title VI disparate impact analysis is modeled on the analysis developed by federal courts to analyze disparate impact in the context of Title VII further supports my conclusion that the enforcement of the right to challenge a facially neutral practice, which has an alleged adverse disparate impact on persons based on their race, is well within the competence of the judiciary. *See Powell*, 189 F.3d at 393 (stating that "although the Supreme Court has not yet spoken on the issue, the courts of appeals have generally agreed that the parties' respective burdens in a Title VI disparate impact case should follow those developed in Title VII cases").[13] As articulated by the Third Circuit, the analysis to be used in evaluating a Title VI disparate impact claim is as follows:

> [A] plaintiff in a Title VI disparate impact suit bears the initial burden of establishing a prima facie case that a facially neutral practice has resulted in a racial disparity. *See Ferguson v. City of Charleston*, 186 F.3d 469 (4th Cir. 1999); *New York Urban League*, 71 F.3d at 1036; *Elston*, 997 F.2d at 1407. If the plaintiff meets that burden, then the defendant must establish a "substantial legitimate justification," *see New York Urban League*, 71 F.3d at 1036, or a "legitimate, nondiscriminatory reason[ ]," [NAACP v.] *Medical Ctr. Inc.*, 657 F.2d [1322] at 1331, for the practice. *See Georgia State*

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[13] *See also, New York Urban League, Inc. v. New York*, 71 F.3d at 1036; *City of Chicago v. Lindley*, 66 F.3d at 828-29 & n. 12; *Elston v. Talladega County Bd. of Educ.*, 997 F.2d at 1407; cf. *NAACP v. Medical Ctr., Inc.*, 657 F.2d 1322, 1333 (3d Cir. 1981) (en banc) (accepting without comment parties' suggestion that "the decisional law allocating the burden of production and persuasion under Title VII is instructive in [a Title VI] case").

Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985). Once the defendant meets its rebuttal burden, the plaintiff must then establish either that the defendant overlooked an equally effective alternative with less discriminatory effects or that the proffered justification is no more than a pretext for racial discrimination. *See Georgia State Conference*, 775 F.2d at 1417.

The disparate impact cause of action was first announced by the Supreme Court in the context of Title VII, in *Griggs v. Duke Power Co.*, 401 U.S. 424, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971). The burden-shifting analysis described above was articulated in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), and has been routinely applied by federal courts to evaluate allegations of disparate impact in a variety of contexts, including but not limited to Title VI. *See, e.g., City of Rome v. United States*, 446 U.S. 156, 172-173, 64 L. Ed. 2d 119, 100 S. Ct. 1548 (1980) (construing §5 of the Voting Rights Act).

Based on the well-developed contours of disparate impact jurisprudence, and the experience federal courts have in applying disparate impact analysis in a variety of contexts, including Title VI implementing regulations, I conclude that the right asserted by Plaintiffs, to be free of discrimination resulting from the adverse disparate impact of a facially neutral policy implemented by a recipient of federal funding, is neither vague, nor amorphous, and is well within the competence of the judiciary to enforce.

c. Whether the Provision "Unambiguously Imposes a Binding Obligation on the States"

The final factor in the Blessing analysis requires this Court to consider whether the provision in question "unambiguously imposes a binding obligation on states." *Blessing*, 520 U.S. at 341. "In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms" to create a right enforceable under §1983. *Id.* Provisions which indicate "no more than a confessional preference--at most a 'nudge in the preferred direction" are not intended to, and therefore, according to the Supreme Court, cannot, rise to the level of an enforceable right. Wright, 479 U.S. at 423 (citing *Pennhurst*, 451 U.S. at 19).

An analysis of the language of Title VI and of the EPA's implementing regulation reveals that Congress intended to place mandatory obligations on recipients of federal funding. Section 601 states that "no person shall, on the ground of race, color, or national origin" be subjected to discrimination under any program which receives federal funding. 42 U.S.C. §2000d (emphasis added). Section 602 "authorized and directed" federal agencies to develop regulations which implemented the objectives of Title VI. 42 U.S.C. §2000d-1 (emphasis added). The EPA's implementing regulations incorporate the mandatory language of section 601 into the general anti-discrimination provision, 40 C.F.R. §7.30 (explaining that "no person shall..."). The implementing regulations address the issue of disparate impact discrimination with particularity under the section titled "specific provisions," stating that recipients of federal funding "shall not use criteria or methods of administering their

program[s] which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex." 40 C.F.R. §7.35(b).

The use of the term "shall" indicates a mandatory obligation. *See, e.g., Marie O. v. Edgar*, 131 F.3d at 620 (explaining that "the statutory language . . . is direct: it uses 'shall' and 'required.' The natural meaning of these terms is mandatory, not precatory"); *Johnson v. Guhl*, 91 F. Supp. 2d 754, 769 (D.N.J. 2000) (Bassler. J.) (stating that "the use of the word "shall" in §1396p(c)(2)(D) makes the [provision] mandatory rather than precatory"). The fact that Congress conditioned the receipt of federal funding on compliance with Title VI further indicates the mandatory, rather than precatory, nature of the States' obligation. *See, e.g., Doe v. Chiles*, 136 F.3d 709, 718 (11th Cir. 1998) (applying Blessing and noting that the fact that federal funding was predicated on compliance with Medicaid statute indicated that compliance was mandatory in satisfaction of the third Blessing factor).

To paraphrase the Supreme Court's language in Wilder, Title VI and the EPA's implementing regulations "succinctly set forth a congressional command which . . . is wholly uncharacteristic of a mere suggestion or nudge." *Wilder*, 496 U.S. at 498 (citation omitted). Accordingly, I conclude that Title VI, and specifically the EPA's implementing regulations promulgated thereunder, unambiguously impose a binding obligation on states in satisfaction of the third Blessing factor.

5. Whether Congress Has Expressly or Impliedly Foreclosed Plaintiffs' Ability to Enforce the EPA's Disparate Impact Regulations, Promulgated Pursuant to Title VI, Under §1983

Because I have concluded that Plaintiffs have asserted the violation of a "federal right," the Plaintiffs are entitled to a "rebuttable presumption that the right is enforceable under §1983." *Powell*, 189 F.3d at 401 (citing *Blessing*, 520 U.S. at 341). The presumption arises because Congress is "presumed to legislate against the background of section 1983 and thus to contemplate private enforcement of the relevant statute against state and municipal actors absent fairly discernible congressional intent to the contrary." *Samuels v. District of Columbia*, 248 U.S. App. D.C. 128, 770 F.2d 184, 194 (D.C. Cir. 1985). As the Third Circuit recently explained,

The presumption is rebutted if Congress specifically foreclosed a remedy under §1983 . . . either expressly, by forbidding recourse to §1983, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under §1983.

Powell, 189 F.3d at 401 (citations and internal quotations omitted). The Supreme Court has stated that this is a difficult presumption to overcome:

We do not lightly conclude that Congress intended to preclude reliance on §1983 as a remedy for the deprivation of a federally secured right. The burden is on the State to show by express provision or other specific evidence from the

statute itself that Congress intended to foreclose such private enforcement.

Wilder, 496 U.S. at 520-21, 110 L. Ed. 2d 455, 110 S. Ct. 2510.

The Third Circuit has already held, and Defendants do not dispute, that "neither Title VI nor the regulations promulgated thereunder purports to restrict the availability of relief under §1983." *Powell*, 189 F.3d at 401. "Defendants thus 'must make the difficult showing that allowing a §1983 action to go forward in these circumstances 'would be inconsistent with Congress' carefully tailored scheme.'" *Id.* (quoting *Blessing*, 520 U.S. at 346).

SLC and the NJDEP contend that the EPA's Title VI implementing regulations create a comprehensive enforcement scheme which demonstrates that Congress implicitly intended to preclude plaintiffs from pursuing a §1983 action. Specifically, Defendants argue that Plaintiffs are foreclosed from seeking a remedy under §1983 because: (1) the EPA's §602 regulations require recipients to provide grievance proceedings (which the NJDEP did not), *see* 40 C.F.R. §7.90;[14] (2) the regulations define "Agency Compliance Procedures" which EPA will utilize to secure compliance, *see* 40 C.F.R. §7.105 et seq.; and (3) the EPA Administrator is authorized, under §602, to withdraw federal funding from a recipient in the event of noncompliance, *see* 42 U.S.C.

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[14] This section provides, in relevant part, as follows: "Each recipient shall adopt grievance procedures that assure the prompt and fair resolution of complaints which allege violation of this part." 40 C.F.R. §7.90.

§602.[15] To evaluate Defendants' arguments, I shall first consider Supreme Court precedent specifically addressing the question of implied Congressional preclusion of a remedy under §1983. I shall then consider the implications, if any, of the Supreme Court's recent decision in *Sandoval* on this analysis.

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[15] Section 602 provides, in relevant part, as follows:

> Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

42 U.S.C. §602.

Over the last two decades, the Supreme Court has developed a substantial body of jurisprudence addressing the enforceability of federal rights under §1983. *See, e.g., Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Assoc.*, 453 U.S. 1, 69 L. Ed. 2d 435, 101 S. Ct. 2615 (1981); *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 67 L. Ed. 2d 694, 101 S. Ct. 1531 (1981); *Smith v. Robinson*, 468 U.S. 992, 82 L. Ed. 2d 746, 104 S. Ct. 3457 (1984); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 L. Ed. 2d 420, 110 S. Ct. 444 (1989); *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 110 L. Ed. 2d 455, 110 S. Ct. 2510 (1990); *Suter v. Artist M*, 503 U.S. 347, 118 L. Ed. 2d 1, 112 S. Ct. 1360 (1992); *Livadas v. Bradshaw*, 512 U.S. 107, 129 L. Ed. 2d 93, 114 S. Ct. 2068 (1994); *Blessing v. Freestone*, 520 U.S. 329, 137 L. Ed. 2d 569, 117 S. Ct. 1353 (1997).

Given the presumption of enforceability under §1983, however, it is perhaps not surprising that the Court recently acknowledged that "only twice have we found a remedial scheme sufficiently comprehensive to supplant §1983." *Blessing*, 520 U.S. at 347 (citing *Sea Clammers*, 453 U.S. 1, and *Smith v. Robinson*, 468 U.S. 992, 82 L. Ed. 2d 746, 104 S. Ct. 3457 (1984), superceded by statute, 20 U.S.C. §1415). The Court described its reasoning in Sea Clammers and Smith v. Robinson as follows:

In Sea Clammers, we focused on the "unusually elaborate" enforcement provisions of the Federal Water Pollution Control Act, which placed at the disposal of the Environmental Protection Agency a panoply of enforcement options, including noncompliance orders, civil suits, and criminal penalties. 453 U.S. at 13. We emphasized that

several provisions of the Act authorized private persons to initiate enforcement actions. We found it "hard to believe that Congress intended to preserve the §1983 right of action when it created so many specific statutory remedies, including the two citizen suit provisions." *Id.* at 20. Likewise, in Smith, the review scheme in the Education of the Handicapped Act permitted aggrieved individuals to invoke "carefully tailored" local administrative procedures followed by federal judicial review. We reasoned that Congress could not possibly have wanted parents to skip these procedures and go straight to court by of §1983, since that would have "rendered superfluous most of the detailed procedural protections outlined in the statute." *Id.* at 1011.

Blessing, 520 U.S. at 347.

After reviewing Sea Clammers and Smith v. Robinson, the Court cautioned that "we have [] stressed that a plaintiff's ability to invoke §1983 cannot be defeated simply by 'the availability of administrative mechanisms to protect the plaintiff's interests.'" *Id.* (quoting *Golden State*, 493 U.S. at 106) (emphasis added). For example, in Wright, the Court "rejected the argument that the Secretary of Housing and Urban Development's 'generalized powers' to audit local public housing authorities, to enforce annual contributions contracts, and to cut off federal funding demonstrated a congressional intention to prevent public housing tenants from using §1983 to enforce their rights under the federal Housing Act." *Blessing*, 520 U.S. at 348 (quoting *Wright*, 479 U.S. at 428). Similarly, in Wilder, the Court held that the Secretary of Health and Human Services' power to reject state Medicaid plans or to withhold federal funding to States whose plans did not comply with federal law did not preempt an individual

from seeking to enforce rights created the relevant provision through §1983. *See Wilder*, 496 U.S. at 523; *Blessing*, 520 U.S. at 348. As the Supreme Court in Blessing concluded, "even though in both [Wilder and Smith v. Robinson] these oversight powers were accompanied by limited state grievance procedures for individuals, we found that §1983 was still available." *Blessing*, 520 U.S. at 348.

Based on my review of applicable Supreme Court precedent, I conclude that the enforcement scheme created by the EPA hardly qualifies as "an elaborate enforcement provision" such as those which the Supreme Court considered in Sea Clammers and Robinson v. Smith. For example, the statute which was the subject of the litigation in Sea Clammers contained detailed procedural provisions for citizen suits to be brought under the statute, which plaintiffs in that case had ignored, including notice requirements which mandated that plaintiffs notify the EPA before filing suit. *Sea Clammers*, 453 U.S. at 8; *see also* 28 U.S.C. §1331, 33 U.S.C. §§1415(g) and 1365(b)(1)(A). In contrast, Congress did not create such a scheme in Title VI, but instead included a general provision for the termination of federal funding, and deferred to federal agencies to articulate standards for compliance with Title VI's anti-discrimination provisions. *See* 42 U.S.C. §2000d-1. In *Wright*, 479 U.S. at 428, the Supreme Court specifically held that the power to terminate funding is a "generalized power" which is "insufficient to indicate a congressional intention to foreclose §1983 remedies." *Id.*; *see also Blessing*, 520 U.S. at 348 (rejecting defendants' claim that Title IV-D of the Social Security Act precluded individual enforcement under §1983 because it provided only the "limited powers to audit and cut funding").

Furthermore, the EPA's Title VI implementing regulations, while establishing an administrative mechanism for the review of complaints, do not contain any provisions which demonstrate an intent to foreclose individuals from pursuing remedies for alleged violations under §1983. *See* 40 C.F.R. §§7.105-7.135. In fact, EPA's recently issued Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits ("Draft Investigation Guidance"), 65 Fed. Reg. 39650, 39673 (June 27, 2000), recognizes and specifically addresses the possibility that individuals will seek judicial relief to vindicate their right to be free of discrimination caused by the adverse disparate impact of a facially neutral environmental permitting policy implemented by a federally funded agency. *Id.*[16] Paraphrasing

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[16] For example, the Draft Investigation Guidance provides, in relevant part, as follows:

[The EPA's Office of Civil Rights ["OCR"] will generally dismiss complaints without prejudice that are the subject of either ongoing administrative permit appeals or litigation in Federal or state court . . . In such cases, OCR believes that it should await the results of the permit appeal or litigation . . . OCR expects to waive the time limit to allow complainants to refile their complaints after the appeal or litigation, rather than conduct a simultaneous investigation on the basis of facts that may change due to the outcome of the administrative appeal or litigation . . . OCR may chose not to proceed with a complaint investigation if the allegations in the complaint were actually litigated and substantively decided by Federal court. For example, if a Federal Court reviewed evidence presented by both parties and issued a decision that stated the allegations of discrimination were not true, OCR may chose not to investigate allegations in the complaint that deal with those same issues . . . Generally, OCR may choose to investigate if the

the Supreme Court's conclusion in *Wright*, I conclude that not only are Title VI and the EPA's implementing regulations "devoid of any express indication that exclusive enforcement authority was vested in" the EPA, but also that the EPA's actions "indicate that enforcement authority is not centralized and private actions were anticipated." *Wright*, 479 U.S. at 424.

The Supreme Court's recent decision in *Sandoval* does not affect my conclusion. As I have explained, the *Sandoval* decision required the application of a different analysis (the four-factor Cort analysis) to address a different question (whether §602 itself creates a "freestanding private cause of action"). Nonetheless, SLC contends that Justice Scalia's description of §602's restrictions on agency enforcement as "elaborate," albeit in the course of an entirely different analysis, compels this Court to conclude that Congress intended to foreclose plaintiffs from seeking to vindicate rights created by Title VI and its implementing regulations under §1983. SLC Second Suppl. Br. at 2. Yet Justice Scalia himself, in *Sandoval*, commented on the distinction in the analyses used to evaluate implied private right of action claims and §1983 claims, and noted that the plaintiffs' claim in *Sandoval* did not require the Court to consider whether the

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complaint raises issues that were not actually litigated or substantively decided by a Federal court, or if it raises unique and important legal or policy issues. OCR may look for guidance to judicial principles and other provisions of law on how prior court decisions may affect OCR's determination of whether to investigate a complaint.

65 Fed. Reg. at 39673.

remedies provided in § 602 could overcome the strong presumption created in favor of enforceability under §1983:

> And as our Rev. Stat. §1979, 42 U.S.C. §1983 cases show, some remedial schemes foreclose a private cause of action to enforce even those statutes that admittedly create substantive private rights. *See, e.g., Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1, 19-20, 69 L. Ed. 2d 435, 101 S. Ct. 2615 (1981). In the present case, the claim of exclusivity for the express remedial scheme does not even have to overcome such obstacles. The question whether §602's remedial scheme can overbear other evidence of congressional intent is simply not presented . . . .

Sandoval, 532 U.S. 275, 149 L. Ed. 2d 517, 121 S. Ct. 1511, 1522, 2001 WL 408983 at *9. It is clear from the language I have just quoted that Justice Scalia's dicta in *Sandoval* cannot be read to support the conclusion which SLC would have this Court reach, namely, that §602's enforcement mechanisms are so "elaborate" that they overcome §1983's presumption in favor of a plaintiff's ability to enforce federal rights under 1983.

Based on a review of applicable Supreme Court precedent, the Supreme Court's recent decision in *Sandoval*, and consideration of the plain language of the EPA's implementing regulations, I conclude that the limited, generalized enforcement power of the EPA to enforce Title VI and the implementing regulations promulgated thereunder is insufficient to meet the high threshold the Supreme Court has established for regulations which may be deemed so

comprehensive that they demonstrate a Congressional intent to foreclose recourse to §1983.

IV. The Availability of Injunctive and Declaratory Relief in this Case

SLC, NJDEP and Commissioner Shinn contend that vacating the air permits issued by NJDEP to SLC to allow its proposed facility to operate constitutes prohibited retrospective relief in violation of the Eleventh Amendment. *Ex Parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908), however, created an exception to the Eleventh Amendment which permits federal courts to grant prospective injunctive relief against state officials to prevent a continuing violation of federal law. *Id.* at 155-56. Suits against state officials, such as Commissioner Shinn, for prospective injunctive relief under §1983 are not barred by the Eleventh Amendment. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989). As the Supreme Court noted in Will:

> Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under §1983 because "official-capacity actions for prospective relief are not treated as actions against the State." *Kentucky v. Graham*, 473 U.S. 159, 167 n. 14, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985); *Ex Parte Young*, 209 U.S. 123, 159-160, 52 L. Ed. 714, 28 S. Ct. 441 (1908).
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> *Id.*

Notwithstanding the plain language of Will set forth above, the NJDEP has cited Will for the proposition that

Plaintiffs cannot seek relief against the NJDEP under §1983 because the NJDEP is not a "person" within the meaning of §1983. NJDEP Suppl. Br. at 9. While this argument is true as far as the NJDEP is concerned, the NJDEP's failure to cite the language of Will as it relates to an "official capacity" suit against Commissioner Shinn is disingenuous and may well constitute a violation of RPC 3.3.(a).[17]

In *SCCIA I*, this Court issued a declaratory judgment that:

> the NJDEP and Commissioner Shinn have violated Title VI of the Civil Rights Act by failing to consider the potential adverse, disparate impact of the SLC's facility's operation on individuals based on their race, color, or national origin, as part of its decision to permit SLC's proposed facility.

SCCIA I, 2001 WL 392472 at *31. As the Supreme Court has noted, "declaratory relief may be available even though an injunction is not," *Green v. Mansour*, 474 U.S. 64, 72, 88 L. Ed. 2d 371, 106 S. Ct. 423 (1985), citing *Steffel v. Thompson*, 415 U.S. 452, 462, 39 L. Ed. 2d 505, 94 S. Ct. 1209 (1974) and "the propriety of issuing a declaratory

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[17] RPC 3.3(a)(3), **Candor Toward the Tribunal**, provides:

(1) A lawyer shall not knowingly:
* * * *

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

judgment may depend upon equitable considerations, . . . (citation omitted) . . ." *Id.*

The issuance of a declaratory judgment in this case will impose no burden on the state treasury and is ancillary to the injunctive relief issued by this Court, which enjoins ongoing violations of federal law, specifically, Title VI of the Civil Rights Act of 1964 and the EPA's implementing regulations promulgated thereto, codified at 40 C.F.R. §7.10 et seq. Moreover, the injunctive relief issued in this case is narrowly tailored to remedy the violation of Title VI which this Court has found. Commissioner Shinn must reconsider the air permits previously issued to SLC in light of the disparate impact regulations promulgated by the EPA. To suggest that this Court's declaratory judgment vacating the air permits issued to SLC is inappropriate retrospective relief barred by the Eleventh Amendment would exalt form over substance. Far more onerous burdens imposed by injunctive relief ordered by federal courts have been upheld by the Supreme Court. In *Milliken v. Bradley*, 433 U.S. 267, 97 S. Ct. 2749, 53 L. Ed. 2d 745 (1977), a school desegregation case, the Supreme Court upheld an injunction which required state officials to pay one-half the future costs of remedial educational requirements ordered by the District Court. As the Court noted:

The decree to share the future costs of educational components in this case fits squarely within the prospective-compliance exception reaffirmed by Edelman. [*Edelman v. Jordan*, 415 U.S. 651, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974)]. That exception, which had its genesis in *Ex Parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908) permits federal courts to enjoin state officials to conform their

conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury (citation omitted).

433 U.S. at 289.

Moreover, the Supreme Court has recognized that its Eleventh Amendment jurisprudence is often an exercise in "line-drawing" guided by the principles of Ex Parte Young:

For Eleventh Amendment purposes, the line between permitted and prohibited suits will often be indistinct: "The difference between the type of relief barred by the Eleventh Amendment and that permitted by Ex Parte Young will not in many instances be that between day and night (citation omitted)." In discerning on which side of the line a particular case falls we look to the substance rather than to the form of the relief sought, (citation omitted), and will be guided by the policies underlying the decision in Ex Parte Young.

B.H. Papasan v. Allain, 478 U.S. 265, 278-279, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986).

Given the narrowly-tailored nature of the relief ordered in this case, the continuing violation of federal law to be enjoined, the fact that vacating the air permits previously issued to SLC is ancillary to the injunctive relief ordered, and the insignificant impact on the state treasury, I conclude that the

relief ordered in this case is not barred by the Eleventh Amendment.[18]

V. CONCLUSION

For the reasons set forth above, I conclude that Plaintiffs may enforce the disparate impact regulations promulgated by the EPA pursuant to §602 of Title VI under 42 U.S.C. §1983. Accordingly, this Court's Order of April 19, 2001 shall remain in full force and effect. SLC's Motion to Vacate Opinion and Order, or, in the Alternative, for Stay of Order Pending Appeal, shall be denied. The Court will enter an appropriate form of order.

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[18] The parties have not addressed whether the State of New Jersey, and in this case, the NJDEP, has waived its Eleventh Amendment immunity under 42 U.S.C. §2000d-7, which provides in relevant part: "[a] State shall not be immune under the Eleventh Amendment . . . from suit in Federal Court for a violation of . . . Title VI of the Civil Rights Act of 1964 . . . by recipients of federal financial assistance." Virtually every federal court to have construed §2000d-7 has concluded that it validly and effectively waives the Eleventh Amendment immunity of a state once the state accepts federal funds. *See Robinson v. Kansas*, 117 F. Supp. 2d 1124, 1132-33 (D. Kan. 2000). It is undisputed that the NJDEP is a recipient of federal financial assistance under Title VI, and is subject to the waiver of the Eleventh Amendment contained in §2000d-7. Since the parties did not cite, much less brief the applicability of §2000d-7 to this case, I need not address the question at this time. I note, however, that §2000d-7 cuts a clear path through the thicket created by Ex Parte Young and its progeny.

Date: May 10, 2001
STEPHEN M. ORLOFSKY

United States District Judge

ORDER

This matter having come before the Court on its own motion and the motion of Defendant-Intervenor, St. Lawrence Cement Co., L.L.C., to Vacate Opinion and Order of April 19, 2001, or in the Alternative, for Stay of Opinion Pending Appeal, Brian S. Montag, Esq. and Catherine A. Trinkle, Esq., Pitney, Hardin, Kipp & Szuch, LLP, appearing on behalf of Defendant-Intervenor, St. Lawrence Cement Co., L.L.C., Olga D. Pomar, Esq., Camden Regional Legal Services, Inc., Jerome Balter, Esq. and Michael Churchill, Esq., Public Interest Law Center of Philadelphia, and Luke W. Cole, Esq., Center on Race, Poverty and the Environment, appearing on behalf of Plaintiffs, John J. Farmer, Jr., Esq., Attorney General of New Jersey and James M. Murphy, Esq., Deputy Attorney General, appearing on behalf of Defendants, New Jersey Department of Environmental Protection and Commissioner Robert C. Shinn, and;

The Court, having considered the supplemental briefs of the parties, and;

For the reasons set forth in the OPINION filed concurrently with this ORDER, IT IS on this 10th day of May, 2001, hereby ORDERED that:

1. The Motion of Defendant-Intervenor, St. Lawrence Cement Co., L.L.C., to Vacate Opinion and Order of April 19, 2001, or in the Alternative, for Stay of Opinion Pending Appeal, is denied;

2. This Court's Opinion and Order of April 19, 2001 shall remain in full force and effect except as modified by this Order and the Opinion filed concurrently with this Order;

3. Plaintiffs' motion for a preliminary injunction is granted;

4. The air permits issued by the New Jersey Department of Environmental Protection to St. Lawrence Cement Co., L.L.C. are vacated;

5. St. Lawrence Cement Co., L.L.C. is enjoined from operating its proposed facility until further Order of this Court;

6. This case is remanded to the New Jersey Department of Environmental Protection and Commissioner Shinn to make appropriate findings consistent with this Court's Opinion of April 19, 2001 and the Opinion filed concurrently with this Order;

7. The findings made by the New Jersey Department of Environmental Protection and Commissioner Shinn shall be filed with this Court within thirty days of the date of this Order;

8. This Court shall retain jurisdiction of this case.

STEPHEN M. ORLOFSKY
United States District Judge

APPENDIX D

RELEVANT STATUTES AND REGULATIONS

Statutory Provisions

42 U.S.C. § 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. §1979; Dec. 29, 1979, P.L. 96-170, §1, 93 Stat. 1284.)

Section 601 of the Civil Rights Act of 1964
42 U.S.C. § 2000d.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

(Pub.L. 88-352, Title VI, § 601, July 2, 1964, 78 Stat. 252.)

Section 602 of the Civil Rights Act of 1964
42 U.S.C. § 2000d-1.

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or

agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

(Pub.L. 88-352, Title VI, § 602 July 2, 1964, 78 Stat. 252.)

Regulatory Provisions

40 C.F.R. §7.30

No person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, national origin, or on the basis of sex, in any program or activity receiving EPA assistance under the Federal Water Pollution Control Act, as amended, including the Environmental Financing Act of 1972.

40 C.F.R. § 7.35

(a) As to any program or activity receiving EPA assistance, a recipient shall not directly or through contractual, licensing, or other arrangements on the basis of race, color, national origin or, if applicable, sex:

(1) Deny a person any service, aid or other benefit of the program;

(2) Provide a person any service, aid or other benefit that is different, or is provided differently from that provided to others under the program;

(3) Restrict a person in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, aid, or benefit provided by the program;

(4) Subject a person to segregation in any manner or separate treatment in any way related to receiving services or benefits under the program;

(5) Deny a person or any group of persons the opportunity to participate as members of any planing or advisory body which is an integral part of the program, such as a local sanitation board or sewer authority;

(6) Discriminate in employment on the basis of sex in any program subject to section 13, or on the basis of race, color, or national origin in any program whose purpose is to create employment; or, by means of employment discrimination, deny intended beneficiaries the benefits of the EPA assistance program, or subject the beneficiaries to prohibited discrimination.

(7) In administering a program or activity receiving Federal financial assistance in which the recipient has previously discriminated on the basis of race, color, sex, or national origin, the recipient shall take affirmative action

to provide remedies to those who have been injured by discrimination.

(b) A recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex.

(c) A recipient shall not choose a site or location of a facility that has the purpose of effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program to which this part applies on the grounds of race, color, or national origin or sex; or with the purpose of effect of defeating or substantially impairing the accomplishment of the objectives of this subpart.

(d) The specific prohibitions of discrimination enumerated above do not limit the general prohibition of §7.30.